CLERK'S COPY.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1938

## No. 49

HYMAN SCHER, ALIAS WILLIAM SCHER,
PETITIONER,

*vs.*

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 18, 1938.

CERTIORARI GRANTED MAY 31, 1938.

# SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 19, 1938.

—7065

## CAPTION.

THE UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, SS.

At a stated term of the District Court of the United States within and for the Northern District of Ohio begun and held at the City of Cleveland, in said district, on the first Tuesday in April, being the 7th day of said month in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States of America the one hundred and sixty-first.

Present: Honorable S. H. WEST,
*United States District Judge.*

THE UNITED STATES OF AMERICA,
vs.
HYMAN SCHER, alias William Scher.
No. 15,516
CRIMINAL.

Be it remembered that heretofore, to-wit, on the 7th day of May, A. D. 1936 came a Grand Jury of the United States, to-wit: J. T. Ball, Wm. H. Barr, J. H. Beer, Joseph Blackford, Paul J. Blanchard, James E. Carpenter, C. E. Conrad, James Cooper, Max Dickerson, Martha Fesen, A. W. Haas, Charles Hoover, Nelle Kelly, Samuel Kessler, David P. Landsdowne, Chas. E. Lindsley, Wm. L. McGraw, Rosemary McMahon, Howard Nist, Mary F. Reichle, Bertha M. Schmitt, and J. K. Waggoner, which said grand jury returned an Indictment endorsed "A true bill, C. M. Fetzer, Foreman," which indictment is in the words and figures following, to-wit:

## INDICTMENT.

(Filed May 21, 1936.)

THE UNITED STATES OF AMERICA

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, ss.

IN THE DISTRICT COURT OF THE UNITED STATES, within and for the Division and District aforesaid.

At the April Term of said Court, in the year of our Lord, One Thousand Nine Hundred and Thirty-six.

Sec. 1152a, Title 26, U. S. C. A.

The Grand Jurors of the United States of America, duly impanelled, sworn and charged to inquire of crimes and offenses within and for the body of the Eastern Division of the Northern District of Ohio, upon their oath present and find that

HYMAN SCHER,
alias William Scher,

late of the Division and District aforesaid, on or about the 31st day of December, 1935, at Cleveland, in the County of Cuyahoga, State of Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this Court, did knowingly, willfully, feloniously and unlawfully possess in a Dodge DeLuxe Sedan automobile, engine No. DU-158811, serial No. 3911583, license No. LX-418, a quantity of distilled spirits, to-wit: 24 quarts of gin and 13⅓ gallons of whiskey, the immediate containers of said distilled spirits not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed thereon, in violation of Section 1152a, Title 26, United States Code Annotated; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT II

Sec. 1152a, Title 26, U. S. C. A.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and find that the said

HYMAN SCHER,
alias William Scher,

late of the Division and District aforesaid, on or about the 31st day of December, 1935, at Cleveland, in the County of Cuyahoga, State of Ohio, in the Eastern Division of the Northern District of Ohio, and within the jurisdiction of this Court, did knowingly, willfully, feloniously and unlawfully transport in a Dodge DeLuxe Sedan automobile, license No. LX-418, serial No. 3911583, engine No. DU-158811, a quantity of distilled spirits, to-wit: 24 quarts of gin and 13⅕ gallons of whiskey, the immediate containers of said distilled spirits not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed thereon, in violation of Section 1152a, Title 26, United States Code Annotated; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

E. B. FREED,
*United States Attorney.*

No. 15,516.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

THE UNITED STATES OF AMERICA,

vs.

HYMAN SCHER, aka William Scher.

INDICTMENT.

Sec. 1152a, Title 26, U. S. C. A.

A true bill,

C. M. FETZER,
*Foreman.*

E. B. FREED,
*U. S. Attorney.*

(Filed May 21, 1936.)

F. J. DENZLER, *Clerk,*
*U. S. District Court, N. D. O.*

## ORDER OF ARRAIGNMENT AND PLEA OF NOT GUILTY.

(Entered May 25, 1936 by S. H. West, Judge.)

Defendant appeared, was arraigned and entered a plea of not guilty; bond continued.

## MOTION TO SUPPRESS EVIDENCE AND AFFIDAVIT OF HYMAN SCHER.

(Filed April 30, 1937.)

Now comes the defendant, Hyman Scher, in the above entitled cause, and moves the Court to suppress all of the evidence obtained by the search made by the Revenue agents in the above entitled cause, together with all information obtained by reason of such search, and to grant an order requiring the agents to return all articles seized by reason of said search for the following reasons, to-wit:

1. Because the search made of the premises as set forth in the annexed affidavit and the seizure of the property therein mentioned was unlawful in that the officers making the search violated Section 14, Article 1, of the Constitution of the State of Ohio, and the 4th and 5th Amendments of the Constitution of the United States.
2. Because the search of the premises as set forth in the annexed affidavit was unlawful, the said officers having no probable cause to search said premises.
3. Because the search of the said premises, which is part of a private dwelling, was made without a search warrant and not incident to any lawful arrest.

4. Because the said Federal agents are holding said property intending to use it as evidence in the trial of the above cause and the defendant's constitutional rights with regard to searches and seizures will be violated if the said prohibition agents are permitted to offer the property they seized in evidence or to give the evidence they have obtained by reason of said unlawful search and seizure.
5. Because the said premises were searched without a search warrant and without probable cause to believe that a crime was being committed at the time the search was made and in violation of the defendant's rights under our State and Federal Constitutions.
6. Because the premises searched in this cause was a private dwelling and the Government has not shown sufficient facts to justify a search under our State and Federal Constitutions.
7. Because the officers who made the search were trespassing upon the land of the defendant within the curtilage of his dwelling house when they allege they discovered facts by reason of which they claim probable cause for the search of the premises existed.
8. Because the search was made without any warrant for the arrest of the defendant.

This motion is based upon the files and records in this cause and upon the affidavits of Hyman Scher and oral testimony offered at the hearing.

GERALD A. DOYLE,
*Attorney for Defendant,*
521 Guarantee Title Building,
Cherry 4953.

Copy of the within motion received this 30th day of April 1937.

ROY C. SCOTT,
*U. S. District Attorney.*

## AFFIDAVIT OF HYMAN SCHER.

UNITED STATES OF AMERICA,
STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

HYMAN SCHER, being first duly sworn on oath, according to law, deposes and says that he is a resident of the City of Cleveland, County of Cuyahoga, State of Ohio, and a citizen of the United States; that his regular home and domicile 10025 Olivet Avenue, Cleveland, Ohio, and has been continuously for the past fifteen years and upwards; that said domicile and residence above set forth consist of his residence, home and private garage; that on the 31st day of December, A. D. 1935 certain officers went upon the above said premises and without having then and there a regular search warrant searched said premises and took from said premises ninety-two one-fifth gallons of alleged liquor and one 1935 Town Sedan Dodge automobile, serial number 3911583, 1935 license number LX-418.

Affiant further says that he is the sole and separate owner of the said liquor and said Dodge automobile; that on the said 31st day of December, 1935 at about 1:30 in the morning, certain men representing themselves to be officers came upon said premises and without having a search warrant as aforesaid, searched said automobile which was then and there located in the garage adjoining the home of affiant at 10025 Olivet Avenue, Cleveland, Ohio; that said officers then and there seized said automobile and said ninety-two one-fifth gallons of alleged liquor and then and there took the same into their possession and now have the same in their possession.

Affiant further says that said search and seizure was unreasonable and unlawful and in direct violation of the Fourth Amendment of the Constitution of the United States and in direct contravention thereof; that said search was conducted without probable cause and without a search warrant.

Affiant further says that attached hereto and marked Exhibits A and B respectively, is a true and correct photograph of the garage where said automobile and said alleged liquor was seized, and the premises so searched; that said pictures reflect the true physical condition of said garage and its relationship and proximity to the home of affiant.

HYMAN SCHER.

Sworn to and subscribed before me, a Notary Public, this 26 day of April, 1937.

H. M. WITSHOIK,
*Notary Public.*

(Notarial Seal)
Tax fee

My commission expires Nov. 12, 1938.

## MEMORANDUM OF WEST, JUDGE.

(Filed May 5, 1937.)

WEST, *J.*

At defendant's request I have again considered the validity of the search and seizure in the light of *United States v. Kind,* 87 F. (2d) 315, recently decided.

The evidence respecting the question, taken before the former trial, is again relied upon, no further testimony being produced.

The *Kind* case appears to have turned upon whether the agents who saw cans such as were "usually used in transporting Belgian alcohol," in a small garage, after learning from an investigator that Kind's car had been used for transporting and delivering alcohol, and who, the court said, acted on advance information which was merely a tip from an unknown source, had reasonable ground for believing that the car which Kind was seen to drive into this garage, contained unstamped liquor.

In the case at bar the testimony showed that the agents "had information from a source which had heretofore been reliable, to the effect that the Carr-Burke-Rosenthal gang were operating from headquarters at that address, 10838 Drexel, and that they were putting out the same kind of phoney whiskey as they had at 10600 Drexel Avenue, and that around midnight or shortly after, a load of this whiskey would be taken from that premises in a Dodge car license LX-418."

They testified that the car in question appeared at 10838 Drexel at 9:30 p. m. This was a private residence and not a liquor store. The car was then parked in the street and remained about an hour, when a man resembling Scher came out carrying a package, and accompanied by three women, boarded the car and drove away. The car returned at midnight, was driven into the premises, stopped at the rear, not entering the open garage, and remained about half an hour, with lights extinguished. During this time one of the agents heard evidence clearly warranting a belief that the automobile was being loaded with packages wrapped in heavy paper. A man, later identified as Scher, entered this car, later found to bear the license number in question, and as he drove it away it appeared more heavily laden than when the women had been in it.

The agents followed in their own car, and as they were closing up on Scher, he suddenly turned into the driveway of his residence and proceeded into his garage. One of the agents immediately followed and questioned the defendant as to what he had. Even without the damaging answer to the inquiry whether the liquor was tax paid, that it was "Canadian whiskey," I think this and the other surrounding circumstances presented facts within the personal knowledge of the agents sufficient to lead a reasonable discreet and prudent man to believe that liquor was illegally possessed in the automobile to be searched, as stated in *Husty v. United States*, 282 U. S. 695.

The agents had kept Scher's car under observation prior to the seizure and knew that it had been loaded at the Drexel Avenue residence under most suspicious circumstances of time, place and method; that it carried a heavy load which they might well conclude was the phoney whiskey of their information, done up in paper wrapped containers. That this information was insufficient as legal evidence was not fatal, see *Husty* case, *supra*.

In the *Kind* case the officers had no previous contact with the automobile, but simply saw it drive into a suspected garage; and as to whether it carried anything, and if so what, were without knowledge. This, as well as the difference between their mere tip and the information from a reliable source, as to which the agents testify as witnesses for the defendant, seems to distinguish the cases.

Further, in *Kind's* case the court found that the officers had ample time to procure a search warrant. That is entirely problematical here. Certainly no warrant could be procured at 1:00 o'clock of a mid-winter morning. Scher had made one trip from the Drexel Avenue place and then had returned for this load. For all the officers knew or were required to anticipate, he may have intended before the night was over, to drive to some other destination.

Assuming that search at his garage without warrant is presumed illegal, I think the facts overturn such presumption. From them the officers could reasonably conclude that an offense had been committed in their presence and therefore could legally search and thereafter place the defendant under arrest. See *Husty* case, *supra; Ferracane v. U. S.*, 47 F. (2d) 677 (C. C. A. 7).

I adhere to my former decision.

WEST,
*Judge.*

May 5, 1937.

**JURY IMPANELED AND SWORN—TRIAL IN PROGRESS; ADJOURNED UNTIL TOMORROW MORNING.**

(Entered May 6, 1937 by S. H. West, Judge.)

This day came the parties by their attorneys and also came the following named persons as jurors, to-wit: Wm. J. Abbot, Clara V. Anderson, C. B. Armstrong, Harry M. Beardsley, Lydia Black, N. A. Brush, Lon A. Cornell, Earl Culler, Amos Day, Elmer Deiringer, Guy S. Gardner and H. F. Goodrich, who were duly impaneled and sworn according to law and the trial proceeded. And the jury having heard the opening statements of counsel for the parties and all of the testimony

adduced on behalf of the plaintiff, thereupon the defendant by his attorney, moved the Court to arrest the testimony from the jury and direct a verdict in his favor, which motion was overruled by the Court, to which ruling of the Court the defendant by his attorney, excepts. And the jury having heard all of the testimony adduced on behalf of the defendant, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

**TRIAL CONCLUDED; VERDICT OF GUILTY AS TO FIRST AND SECOND COUNTS OF INDICTMENT; SENTENCE OF ONE YEAR AND ONE DAY; JUDGMENT.**

(Entered May 7, 1937 by S. H. West, Judge.)

This day again came the parties by their attorneys and also came the jury heretofore impaneled and sworn herein and the trial proceeded. And the jury having heard the argument of counsel and charge of the Court, retired to their room in charge of a sworn officer of this court to deliberate upon their verdict. And now come said jury into open court with their verdict in writing, signed by their foreman, which verdict reads and is in the words and figures following to-wit:

"District Court of the United States of America Northern District of Ohio Eastern Division April Term, 1937. The United States Plaintiff, vs. Hyman Scher Defendant, No. 15516 Criminal Verdict. We, the jury in the case, being duly impanelled and sworn, do find as to the First Count of the Indictment, the Defendant is Guilty; as to the Second Count of the Indictment, the Defendant is Guilty. Guy S. Gardner, Foreman."

which said verdict was by the Clerk of this Court read in the hearing of said jury, when to which they gave their assent.

Defendant sentenced to be imprisoned in a penitentiary as designated by the Attorney General for a period of one year and one day from date, to pay a fine of $500.00 and costs in the sum of $109.60 for which sums judgment is rendered and execution awarded for the collection thereof.

## ORDER OVERRULING MOTION OF DEFENDANT TO SUPPRESS.

(Entered May 7, 1937 by S. H. West, Judge.)

This day this cause came on to be heard upon the motion to suppress filed by the defendant in the above entitled case, and the Court being fully advised in the premises,

It is ordered that the said motion be and the same is hereby overruled. Exceptions to defendant.

## VERDICT.

(Filed May 7, 1937.)

We, the Jury in This Case, being duly impanelled and sworn, do find as to the First Count of the Indictment, the Defendant is Guilty, as to the Second Count of the Indictment, the Defendant is Guilty.

Guy S. Gardner,
*Foreman.*

## MOTION FOR NEW TRIAL.

(Filed May 7, 1937.)

Now comes the defendant, Hyman Scher, by Gerald A. Doyle, his attorney, and moves this Honorable Court to set aside the verdict returned against him by the jury on May 7, 1937 and to grant him a new trial for the following reasons:

1. That the verdict was not sustained by sufficient evidence and was contrary to law.
2. That the verdict was contrary to the weight of the evidence.
3. That the Court erred in the submission of certain evidence over the objection of the defendant.
4. That the Court erred in overruling defendant's motion made at the end of plaintiff's case, requesting the Court to take the case from the jury and direct a verdict in favor of defendant.
5. That the Court erred in rejecting testimony offered by defendant.
6. For other errors appearing on the record.
7. That the Court erred in overruling defendant's motion to suppress the evidence.
8. That the Court erred in the exclusion and omission of testimony.
9. That the Court erred in its charge to the jury.
10. For abuse of discretion by the Court by which the defendant was prevented from having a fair trial.

GERALD A. DOYLE,
*Attorney for Defendant.*

**Notice.**

Plaintiff will take notice that the above motion has been filed and the same will be on for hearing according to the rules of this Court.

GERALD A. DOYLE,
*Attorney for Defendant.*

**Acknowledgment.**

Service on the motion is hereby acknowledged this 7th day of May, 1937.

ROY C. SCOTT,
*Asst. U. S. District Attorney.*

## ORDER OVERRULING MOTION OF DEFENDANT FOR NEW TRIAL.

(Entered May 7, 1937 by S. H. West, Judge.)

This day this cause came on to be heard on the motion of defendant for a new trial, and was submitted to the Court; on consideration thereof the Court overruled said motion, to which ruling of the Court the defendant by his attorney, excepts.

## NOTICE OF APPEAL BY DEFENDANT HYMAN SCHER AND SERVICE UPON U. S. DISTRICT ATTORNEY.

(Filed June 29, 1936.)

NAME AND ADDRESS OF APPELLANT:

The appellant's name is Hyman Scher and his address is 10025 Olivet Avenue, Cleveland, Ohio.

NAME AND ADDRESS OF APPELLANT'S ATTORNEY:

Gerald A. Doyle, 521 Guarantee Title Building, Cleveland, Ohio.

OFFENSE:

Violation of Section 1152A, Title 26 U. S. C. A., to wit: Violation of the Internal Revenue Laws.

DATE OF JUDGMENT:

June 26, 1936.

DATE OF SENTENCE:

June 29, 1936.

BRIEF DESCRIPTION OF JUDGMENT AND SENTENCE:

The appellant was found guilty under this indictment, which contained two counts, wherein he was charged with knowingly, willfully, feloniously and unlawfully possessing in a Dodge DeLuxe Sedan automobile,

engine No. DU-158811, serial 391-1583, license XL 418 a quantity of distilled spirits, to wit, 24 quarts of gin and 13 one-fifth gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein, in violation of Section 1152A, Title 26, U. S. C. A.

That the defendant did knowingly, willfully, feloniously and unlawfully possess in a Dodge DeLuxe sedan automobile, engine No. DU-158811, serial 391-1583, license XL 418 a quantity of distilled spirits, to-wit, 24 quarts of gin and 13 one-fifth gallons of whiskey in violation of Section 1152A, Title 26, United States Code Annotated.

The defendant was found guilty on June 26th, 1936 and the Court, on June 29th, 1936 passed sentence as follows: That the appellant be imprisoned and confined in the U. S. Reformatory at Chillicothe for a period of one year and one day and pay a fine of $300.00.

I, HYMAN SCHER, the above named appellant hereby appeal to the U. S. Circuit Court of Appeals for the Sixth Circuit from the judgment above mentioned on the ground set forth hereinafter.

HYMAN SCHER.

Dated June 29th, 1936.

## Grounds of Appeal.

1. The judgment and sentence are contrary to and against the manifest weight of the evidence and are contrary to law.

2. The judgment and sentence are not supported by any substantial evidence and are contrary to law.

3. That the Government failed to prove that the defendant had conscious knowledge that the liquor in his possession was non-tax paid.

4. That the Government failed to prove that the liquor found in the possession of the defendant was not for his own use.

5. That the Court erred in overruling defendant's motion at the close of the Government's case in chief to direct the jury to return a verdict of "not guilty" of the offense charged for the reason that the Government failed to prove that an offense had been committed under Section 1152A, Title 26, U. S. C. A.

6. That the Court erred in overruling the defendant's motion to suppress the evidence.

7. For other errors occurring at the trial and excepted to by counsel for the defendant.

GERALD A. DOYLE,
*Attorney for Appellant,*
521 Guarantee Title Bldg.,
CH 4953

Receipt of a copy of this notice of appeal is hereby acknowledged this 29th day of June, 1936.

E. B. FREED,
*U. S. District Attorney.*
By JEROME CULTIS.
per L. N.

## ORDER DIRECTING APPELLANT TO LODGE BILL OF EXCEPTIONS.

(Filed March 15, 1937.)

Pursuant to notice, counsel for the parties this day appeared for directions for preparation of the record herein on appeal. The undersigned trial judge hereby directs appellant on or before June 5th, 1937 to procure his bill of exceptions setting forth the proceedings upon which he wishes to rely in addition to those shown by the clerk's record as described in Supreme Court Criminal Procedure Rule VIII and lodge the same with the clerk, at which time he will file with the clerk his assignment of the errors of which he complains and also a praecipe stating the portion of the clerk's record to be included in the record on appeal. Appellant will thereupon notify the United States Attorney of the time, not more than three days thereafter, when he will ask the trial judge to settle and sign his bill of exceptions. Such bill must

conform to Rule VIII of the General Rules of the Supreme Court, will be settled not later than June 8th, 1937 and upon such settlement appellant will file the same with the clerk.

Upon the filing of the assignment of errors and of the bill of exceptions after settlement, the clerk will proceed as provided by Supreme Court Criminal Procedure Rule IX and Circuit Court of Appeals Rule 18, Section 7.

S. H. West,
*United States District Judge.*

May 15th, 1937.

## ORDER FIXING BAIL BOND.

(Entered May 7, 1937 by S. H. West, Judge.)

This day this cause came on to be heard on the motion of defendant for an order releasing him from custody of the United States Marshal upon his giving bail in such amount as fixed by the Court, and was submitted to the Court; on consideration thereof the Court ordered the defendant be admitted to bail in the sum of $2000.00.

## BAIL BOND.

### Supersedeas Recognizance.

(Filed May 7, 1937.)

Know all Men by these Presents, that we Hyman Scher, as principal, and United States Fidelity and Guaranty Company as surety, are held and firmly bound unto the United States of America in the full and just sum of Two Thousand Dollars ($2,000.00), for the payment of which to the said United States of America well and truly to be made, we and each of us, do hereby bind ourselves, our successors, personal representatives, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of May, A. D. 1937.

WHEREAS lately, at a session of the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit pending in said Court, at Cleveland, Ohio, between the United States of America as complainant and Hyman Scher as defendant, a Judgment was rendered against said Hyman Scher defendant, on the 7th day of May, 1937, sentencing said Hyman Scher to be imprisoned for a term of one year and one day in a penitentiary as designated by the Attorney General (Chillicothe, Ohio) and also to pay a fine of Five Hundred & 00/100 Dollars ($500.00), and costs of prosecution, and the said defendant Hyman Scher having obtained an appeal from said Court and filed a copy thereof in the Clerk's office of said Court to reverse the Judgment in the aforesaid suit; and whereas the said defendant Hyman Scher desires said appeal to operate as a stay of execution and to be admitted to bail and to be permitted to be and remain at large on bail pending said proceedings on appeal to the said Circuit Court of Appeals for the Sixth Circuit.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Hyman Scher shall prosecute his appeal to effect, and if he fail to make his plea good, shall also personally be and appear here in this Court from day to day during the present term and from term to term of this Court thereafter, pending said proceedings on appeal, and shall surrender himself to the United States Marshal of this district and be present to abide the Judgment of this Court or that of the Circuit Court of Appeals for the Sixth Circuit and serve his sentence and not depart the jurisdiction of this Court without leave thereof, then this obligation to be void; otherwise to remain in full force and virtue.

HYMAN SCHER.

UNITED STATES FIDELITY AND GUARANTY CO.
M. H. KOSSER, *Attorney-in-Fact.*

Taken and acknowledged before me at Cleveland, Ohio, this 7th day of May, A. D. 1937.

C. B. WATKINS, *Clerk.*
By K. V. WILSON,
*Deputy Clerk.*

Approved this 7th day of May, 1937.

S. H. WEST,
*U. S. District Judge.*

## ORDER FIXING TIME FOR PREPARATION OF RECORD.

(Filed May 8, 1937.)

It appearing to the undersigned trial judge that the defendant on May 7th, 1937 filed with the clerk of this court his notice of appeal:

Therefore, pursuant to Rule VII of the Supreme Court prescribing procedure in criminal cases, it is hereby ordered and directed that the above mentioned appellant or his attorney and the United States Attorney appear before the undersigned trial judge at the Federal Court House in Cleveland on the 15th day of May, 1937 at 10 o'clock a. m. for appropriate directions respecting the preparation of the record on appeal and other matters mentioned in such rules.

The clerk will forthwith serve a certified copy hereof by mail upon appellant or his attorney and upon the United States Attorney.

S. H. West,
*United States District Judge.*

May ....., 1937.

## DEFENDANT'S NARRATIVE FORM BILL OF EXCEPTIONS.

(Filed June 8, 1937.)

Be it remembered that on the trial of the above entitled cause, in the District Court of the United States, Northern District of Ohio, Eastern Division, at the April 1937 term thereof, before Honorable Samuel H. West, one of the judges of said court, the following proceedings were had:

Trial had May 4, 1937.

Appearances: For the plaintiff, Roy Scott, Assistant United States Attorney. For the defendant, Gerald A. Doyle, Esq.

It was thereupon stipulated and agreed that the testimony previously received in this case on the motion to suppress the evidence, as found in the record before the Court of Appeals, pages 20 to 28, inclusive, be received as the evidence on said motion on this trial. Said pages being as follows:

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On motion to suppress evidence, hearing of June 20, 1936:

### DEFENDANT'S TESTIMONY.

HYMAN SCHER, the defendant, offered himself as a witness, and, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Hyman Scher. I am the defendant in this action and live at 10025 Olivet Avenue. I have lived there about 14 years. My dad and mother, my brother, sister, my brother and sister-in-law live there with me. It is a two-family home and we occupy the upstairs. I would say the garage is about six feet away from the house.

Exhibits A and B are pictures of the house and garage, and show the condition as of December 30, 1935. I was arrested on that day by the officer over there (indicating), and another one I don't remember the name. About seven cases of liquor and a Dodge automobile, property of mine, were taken by the officers. They did not have a search warrant or other warrant. That place where I lived was not used for any business of any kind. There is no business on the street near there of any kind.

To my knowledge there had not been any trafficking in liquor around these premises. I have never been arrested or convicted of any liquor charge, or anyone else in my family.

CROSS EXAMINATION by Mr. McNamee.

I am 28 years old, and have been with my brother in the hat business, manufacturing and renovating men's hats at 1102 Prospect. I have been with him for two years. Previous to that I had my own business, in ladies ready to wear. Just my brother and I were in that hat shop; it was not a corporation. Max Diller worked there, also Harold Pilley and Mrs. Weiss. A person by the name of Marcus worked for us, but we fired him. He worked last July. He was with us since the business opened until last July, about a year and a half. Marcus is no relation to me. He is a brother-in-law to my brother.

There were 84 bottles of liquor in the seven cases. The liquor was Scotch, bourbon and gin. I don't remember the proportions. I got that liquor at 10838 Drexel around midnight. I was there at first around 9:30. I went away and I came back around midnight. I was not there very long when I returned. That was a single home. A party by the name of Carr lived there. I believe I heard them call him Jack, somebody called him Jack. I just met him that day up at his house; I was sent over there. The first meeting was when I was there the first time at 9:30. There was some women also there. I believe one of them was his wife, I don't know who the other two were. Those women left there with me when I left about 9:30. I took them out to the Heights. One of them gave me the direction, I don't know, I am not very familiar with the Heights. I also went to my brother's. The purpose of my going to my brother's was just telling him I was getting some bargain on some liquor. I went to talk to him. I had a case with me, a case of whiskey, when I went to my brother's. I was given to believe it was whiskey, there was six in the package. I opened the case when I got there and there were 12 bottles in that case.

I was driving a Dodge car license LX-418. That car was registered in my brother's name. The bill of sale was recorded in my brother William's name. William is the brother that lives at my home. Sam is the brother to whom I took the case of liquor at 3287 Westminster. My younger brother Irv is in the hat business

with me. The brother Sam is the one that is related to Marcus. Sam is the sales manager of the automobile concern. When we had Marcus he had some business dealings with fellows and we let him go. I don't know if they were liquor dealings. People started questioning him around the store, and we let him go. My brother talked to somebody, he claimed they were from the internal revenue, and when we found that out we just told him he would have to go.

I went to Carr's place by myself on this evening for the first trip. I introduced myself to Carr. I hadn't known him before that. I didn't know if there was liquor there but I was told to go over there. I went there for the purpose of getting liquor. I got the information there was liquor there from some fellow down at the store. I don't know that fellow. You know a store that people come in and out, you get in conversation and he happened to tell me where I could get some. I got that information during the same day. This fellow called Carr up from the Hotel Carter Drug Store, called him up and told him he was sending me out. I was driving this same Dodge car at the time I was arrested. The seven cases of liquor were in the trunk compartment, which is located on the rear of the car.

I was at Charleston, West Virginia, about three or four weeks before the time I was arrested. I had not been down there doing business with a man named Corter at the Daniel Boone Hotel. I went down to Charleston, we had a Mr. Lennon, who is sales manager of our store, he told us there is an opportunity to rent a store in Charleston, there is no hat renovating store and manufacturer of men's hats, and he told me to go down there and look around. I went down there and I didn't see any store and I come back. At no time before I was arrested did I meet a man named Corter. I had this Dodge car down there in which I was transporting liquor on the night of my arrest. That car had been purchased from Blaushild in Cleveland. I did not send a telegram to Corter, to Charleston, West Virginia, a few days before I was arrested. My first name is Hyman. I am not also called "Hy." I have a telephone at home and had one in December, Garfield 0626. There is nobody else at that address named "Hy."

Q. Now, I will ask you if you didn't send to O. D. Corter, address 235½ Maple Street, Clarksburg, West Virginia, under date of December 24, 1935, a Western Union wire reading: "Did not receive check stop In

Wheeling Merry Christmas" signed "Hy," and that that message was telephoned to the Western Union from your phone number, Garfield—626—what about it? A. I did not send it. I do not know anything about it.

The Court: Your questions, as I recall, have related to Charleston, West Virginia.

Mr. McNamee: I recall that now. I am sorry. I was mistaken at the time I asked. It is Clarksburg.

Q. To straighten out the matter, where I said Charleston, West Virginia, I should have said Clarksburg. Now, were you in Clarksburg, West Virginia, at or around the Christmas season of 1935? A. No.

(Narrative continued) At no time did I see a man named Corter at the Daniel Boone Hotel there, and I did not send this telegram to this man Corter. I wasn't in Clarksburg, West Virginia, three or four weeks prior when I was in Charleston. I was never in Clarksburg, nor was this Dodge car in Clarksburg.

I couldn't tell you who loaded the seven cases of liquor into my car because I was in the living room and the car was in the back. I was told there would be seven cases in the car. I paid this Carr $145 for it. I couldn't see if there were tax stamps on that liquor; it came in packages. This was a private residence, not a state store. I didn't pay any attention as to whether there were tax stamps on the liquor I took to my brother. I opened it.

At the time I was placed under arrest the car was in the garage. I drove in there and got out of the car. I saw someone come rushing in with a searchlight, a flashlight, started waving with his flashlight. Between the address at which I got the liquor and my home I had stopped at a gasoline station, got some gas and went in and got a paper.

RE-DIRECT EXAMINATION by Mr. Doyle.

I did not have that liquor for sale or for the manufacture of any articles containing liquor.

As to why the Dodge car which was taken from me was registered in my brother Will's name instead of my own name,—when I was in business my store was burglarized and they took all my merchandise away, I couldn't pay for it, my credit was shot. My brother's credit was good so he gave me full consent to buy it in

his name. That was in 1932 when my store was burglarized. The newspaper clippings now shown me describe that burglarizing of my store.

RE-CROSS EXAMINATION by Mr. McNamee.

I arranged for the purchase of this car to help my brother who was in the automobile business. That was my brother Sam. That arrangement was made out at Benny Blaushild's. I believe arrangements were made with my brother, who worked for Blaushild Company. My brother sold the car on behalf of the Blaushild Company. Notes were signed for the car. I signed the notes in my brother's name. He told me I could sign them. That was my brother William. My brother Sam wasn't there at the time. The people from Blaushild's were there when I signed the notes with William Scher's name. They knew I wasn't William Scher. I didn't tell them; they knew it. A mortgage was also signed with the name William Scher by me at the same time. Associates Investment was the finance company carrying the notes. Payments were made on the notes after the car was purchased in October to Associates. I made it or my father made it. I didn't have any conversation with the Associates. I never disclosed to them I wasn't William Scher.

This is not the first car I have had. The car before this that I had was a Plymouth. I had that from September until October last. I turned the Plymouth back to the C. I. T. That was bought from the Arrow Motor Sales out on 152nd and St. Clair in Cleveland in my own name. I signed notes for that one also. The C. I. T. Investment carried the notes for that car. A mortgage was also signed on that car in my name. I made some payments on that car. I had an Auburn car before that. That was bought from B. W. Blaushild by me in my name, and notes and the mortgage were signed in my name. The payments were made to the Associates Investment Company. That Auburn was bought a year ago, December or November, 1934. I did not complete paying for the car but turned around and traded the Auburn for a Plymouth. It was only the last car that was purchased in the name of William Scher. My credit didn't warrant me buying a new automobile.

This burglary took place in 1932. My credit was not good because of the burglary.

(Newspaper clipping, Defendant's Exhibit C, and photographs marked Defendant's Exhibits A and B, offered and received in evidence and are attached hereto and made a part hereof.)

Mr. Doyle: I offer the exhibits and I rest.

Mr. McNamee: The government moves for the dismissal of the motion.

(Argument had; counsel for defendant granted permission to introduce further testimony.)

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SIDNEY M. BOWES, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Sidney M. Bowes; occupation, Investigator, Alcohol Tax Unit, and I was such on December 30th last. I am one of the officers who arrested Hyman Scher, the defendant. We had no warrant for any premises or for the defendant, no warrant of any kind. The arrest was made just outside of the garage of the defendant. The car was in the garage. The liquor was found in the rear of the car where he told us it was.

With other officers I had been observing, since about 8:00 P.M., the premises known as 10838 Drexel Avenue, Cleveland, Ohio. We had information from a source which had heretofore been reliable to the effect the Carr-Burke-Rosenthal gang were operating from headquarters at that address, 10838 Drexel, and that they were putting out the same kind of phoney whiskey as they had at 10600 Drexel Avenue, and that around midnight or shortly after a load of this whiskey would be taken from that premises in a Dodge car, license LX-418. We posted ourselves about 8:00 P.M. in these premises, and I believe it was around 9:30 we first saw this car arrive at the premises, this Dodge car LX-418, and remain there for about an hour, and at the expiration of that time a man resembling the defendant, I couldn't positively identify him at that time, came from this single dwelling at 10838 Drexel Avenue, accompanied by three women, got into the car and drove away. When he came to the car the man I saw come out had a package in his hand of the same size and shape as those later seized containing whiskey. We followed the car away. As I say, it was about two hours, about the time expiration of our information the load was to be hauled. The car returned

around midnight or a few minutes later. Previously it had parked in the street. This time when it returned it drove up toward the garage. The garage doors were open. The night was a bitter night, snow on the ground, the car didn't drive into the garage, stopped at the rear corner of the house, near the door which led into the basement on the ground level. The car remained there for approximately a half hour. During that time I observed the premises, saw what I have stated, saw the lights of the car were out, and then I saw Investigator Williamson approach the premises, remain ten or fifteen minutes, then come back to the car where I was and communicated to me what he had seen and observed. About 12:30 the car left and we followed. There was one person in it when it left. There had been the driver and three women in it when it arrived. It appeared to me the car was loaded heavier when it left with one man in it than it had with the three. We followed the car a distance of two or three blocks, where it stopped at a gasoline station. I saw a man, later identified as the defendant, get out of the car as soon as he got to the station, go across the street, remain a minute or two, come out with a paper in his hand, return to the car, and immediately leave with it. We were half a block away making observation. We followed him about two or three blocks, were closing up close to the car when he went into this drive at 10025 Olivet Avenue. He was coming slowly to a stop and we couldn't make a quick stop on account of the streets being slippery. As the car slowed to a stop I jumped out of the car, and followed the car back to the garage with my flashlight. The car was standing in the garage, the headlights were on, and the defendant Scher had alighted from the car and walked to the back door of the garage. I had a bag and I had the flashlight and I said, "I am a federal officer, I have a tip that this car is hauling bootleg liquor." The defendant said, "Just a little for a party." I said, "Is it tax paid?" He said, "It is Canadian whiskey." I said, "Is it in there?" He said, "It is." After that I opened the trunk, found the trunk full of these cases, I think 14 packages, it totalled 88 bottles in that trunk, and two bottles next to the driver's seat. After we examined these bottles—we didn't examine them all then, examined several, found there was no tax stamps on the bottles or the cases, and the defendant was then placed under arrest, the car and whiskey taken away from him.

CROSS EXAMINATION by Mr. McNamee.

As near as I can judge, those packages were identical with the packages I had seen earlier in the evening when he first came away from the house. Officer Williamson was on this job with me. He is now on leave and will return on Monday. He made some observations of matters that I did not see or hear myself. He communicated to me.

Mr. Doyle: I will admit if Officer Williamson was here he will testify the same as the present witness.

The Court: You may with that agreement relate to the Court what Williamson told you he saw or heard in your absence.

The Witness: He said, "I heard something heavy set down, like wood, and heard it slide, like it was heavy paper, across a wooden surface, and I heard the house door slam, the trunk slam, and the door of the car slam." He stated a conclusion. I don't know whether you care to hear it or not, a conclusion on his part.

The Court: No, the Court would like to know what material the so-called cases were made out of?

The Witness: It was a heavy, very heavy wrapping paper with at least two wrappings, very heavy brown paper.

The Court: Containing each how many bottles?

The Witness: Six bottles to each one. And then a heavy cord around crossways, so that it was handy to pick it up. The cords were both ways.

(Narrative continued) The bottle now shown me was one of the bottles. There were 24 like this filled. They weighed a bottle and it weighed four pounds, seven and a half ounces. There were 90 bottles all told—88 and 2 in the seat beside the driver. The trunk was on the extreme rear of the car; the conventional place for an automobile trunk, extreme rear of the car. It extended over the rear axle. The trunk door turned with one hand.

The Court: When you stated a while ago the car seemed to ride heavier, just what did you mean?

The Witness: I meant I had seen the car there with the driver and three women in it and saw it traverse perhaps half a block and turn in this driveway. I seen it traverse about the same distance when it left, and when it came out, when we followed it,

the car in which we subsequently found the whiskey there was one driver, one person the driver, and the rear end as it drove along and went over the bumps would seem to be tail heavy, or heavier than it was when there was three women in it.

RE-DIRECT EXAMINATION by Mr. Doyle.

I didn't observe the springs on this Dodge car at all. I didn't say I seen the springs.

There were six bottles in a package, as I recall, each one. They were wrapped in wrapping paper. Each one was the same.

Mr. Doyle: That is all. I rest again.

The Court: Do you have any testimony?

Mr. McNamee: Nothing to offer.

The Court: I think I will just state that the matter is submitted and examine the briefs.

Mr. Doyle: I will call your attention to this lacking in this proof, not one word did these officers ever have that there was even any tax unpaid liquor, the best they had was information that phoney liquor would be transported.

The Court: I will consider that.

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Thereafter the Court overruled the defendant's motion to suppress evidence; to which ruling of the Court the defendant duly excepted.

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On May 6, 1937, before a jury duly impanelled and sworn, the same counsel being present; the following proceedings were had:

## PLAINTIFF'S TESTIMONY.

EARL F. WILLIAMSON, a witness called by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Scott.

My name is Earl F. Williamson; occupation, Investigator Alcohol Tax Unit, Bureau of Internal Revenue. I was so employed December 31, 1935.

I know the defendant. I saw him on December 30, 1935 about 10:30 p.m. the first time. I then saw him about 12:15 or 12:30 a.m. of the morning of December 31st. On the occasion on the 30th I saw him and three women come out of a house on Drexel Avenue, get into

Q. What was the reason for your going out there in this vicinity? A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception.

Q. Proceed. A. That a load of tax unpaid distilled spirits in bottles would be taken from this address or would be taken from a house on Drexel Avenue at about 12:30 a.m. I got the exact address. I will have to refer to my notes. (After referring to same.) 10838 Drexel Avenue.

Q. What did you see on that night? Did you see the defendant after this time you have just spoken of? A. I saw the defendant at about 12:15, between 12:15 and 12:20 a.m. the morning of the 31st return to the premises in this Dodge sedan, drive into this side yard, and around to a point directly at the rear of the house.

Q. Where were you at the time? A. I was standing on the sidewalk on the opposite side of the street.

Q. What did you observe? A. I heard a door open in the rear of the house and heard the sound of paper, sounded as though it was heavy paper, scraping across a hard surface. This occurred several times, and I then heard a heavy door slam; heard a door in the rear of the premises shut. In about two minutes the Dodge car driven by Scher was backed out onto the street and proceeded west along Drexel Avenue to East 105th Street. He then went down to Pasadena Avenue, where the car was driven into the gas station; gas was put in the car, and Scher left the car and went into a delicatessen store, where he bought a newspaper, returned to the car and then drove south along East 105th Street to Olivet Avenue, and he turned west on Olivet Avenue, at which point I endeavored to overtake the car. I was possibly half a city block back. I was driving a government car. Investigator Bowes was with me. Just before I reached the Dodge it swung into the driveway at 10025 Olivet Avenue, proceeded back into the yard, and into the garage. I stopped the government car at this point and saw Bowes leave and run into the driveway. In about two minutes I went into the driveway. There I saw

Scher in custody of Bowes. The back of the car, the trunk of the car was open, and I saw a large quantity of tax unpaid distilled spirits in bottles which bore labels of alleged popular brands of gin and whiskey. At this time Bowes formally placed the defendant under arrest and lodged him in the Bratenahl Police Station.

The car was heavily loaded when it backed out of the driveway at 12:30, although when it went in the car was riding normal. The first time I saw the car three women got into the car. This was about 10:30. The car wasn't excessively weighted down; the normal appearance of a car with four people in it. But the second time the car was heavily weighted down.

That night the streets were clear; they weren't icy. It was not excessively cold; I don't know exactly what the temperature was. The car was about a city block ahead of me when it turned on Olivet Avenue. When we followed the car from Drexel Avenue to the gas station we were about the same distance behind it, I would say probably six or seven hundred feet.

CROSS EXAMINATION by Mr. Doyle

It was in the early part of the evening I received the confidential information liquor would be transported in this particular Dodge sedan. It was about 7:00 o'clock. I considered the source truthful and reliable. If I had not so considered it I would not testify it was. I have the means of knowing truthful and reliable information when I receive it. At that time I had been in the service about 28 months.

Q. Did you receive any other information at any time since the 31st of December, 1935 to the present time, which you considered reliable concerning the actions of the defendant Scher? A. No, I did not.

Q. Did you receive any information which you considered reliable concerning his actions in Charleston, West Virginia?

Mr. Scott: I object, your Honor.
The Court: Objection sustained.
Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: Exception.

(Narrative continued) When the car first drove into the Drexel Avenue driveway I was parked in the government car about four or five houses immediately east. After the car swung into the driveway, I ran down to a point directly opposite the driveway. I was standing on the sidewalk directly opposite the driveway of the house at 10838 Drexel Avenue when the car was loaded. I didn't see anything put in the car. All I say is that I heard something. When the car came out I got in our car with Bowes. We followed the Dodge down to the gas station, and there Scher got out and left his car and walked across to a delicatessen, bought a newspaper, and came back. He wasn't out of the car more than three minutes. He was the only passenger in the car and he left the car. At that time we were parked directly opposite the gas station on East 105th Street, about 70 feet. I did not go over to inspect the car while it was in the public gas station. We remained in our car until he drove out and down Olivet Avenue. He drove from East 105th Street to what would be approximately 100th Street. He was driving about 35 miles an hour. He didn't have the appearance of running away from anyone. T re was nothing suspicious in his actions as to his driving. The car was very heavily loaded. When he drove in the driveway at 10025 he drove in in an ordinary way. He did not go over 15 miles an hour when he went in the driveway. That was a speed one would ordinarily turn in on a night such as December 31, 1935. He drove into the driveway and into the garage.

I have ascertained since that time that was the home of the defendant. I know his mother and father lived there, and there are some other relatives, sisters or brothers.

Inspector Bowes got out of the car before I did. When I got there Bowes was in the garage and had the man under arrest. It was not over two minutes from the time Bowes left the car before I met him in the garage. The defendant was then right at the rear of the car, and Bowes was right next to him.. The trunk was open on the top. It is a built-in trunk. As I walked up I saw several packages of liquor. That was not when I first walked up. As soon as I got into the garage I saw it. I then got all the packages open and found this liquor.

I received my first information about 7:00 o'clock in the evening. My informer told me that at about 12:30

a.m. on the morning of December 31, a Dodge car bearing license LX-418 would leave the premises at 10838 Drexel Avenue with a load of tax unpaid spirits in bottles. I don't recall whether he said "tax unpaid" or "phony" liquor. He used words which indicated it was not State store whiskey. I know the charge against the defendant is that he had tax unpaid liquor. I did not say my informant told me the car would transport "tax unpaid" liquor because I knew the defendant was charged with possessing and transporting tax unpaid liquor. The term "tax unpaid liquor" is a phrase in common usage among investigators engaged in the Alcohol Tax Unit.

I never had any other complaint against Scher; or any complaint or suspicion as to trafficking in liquor in the Olivet premises. I made an attempt to arrest the persons on the Drexel Avenue property. I did not arrest them.

RE-DIRECT EXAMINATION by Mr. Scott.

When the defendant drove in the premises on 10838 Drexel Avenue with his car the second time, I was parked about four or five houses east of 10838. He drove his car directly to what would be the rear door of the house. All I could hear would be the sound of the paper and removing of these articles. That was about 25 feet from the sidewalk where I was.

I took samples of each kind of liquor which we seized and they were transmitted to the government chemist at Detroit, Michigan, for analysis, and the balance were destroyed. There were no internal revenue stamps attached to the containers of the liquor.

RE-CROSS EXAMINATION by Mr. Doyle.

Q. Do you know what the defendant in truth intended to do with that liquor? A. I do not.

Q. You have no personal knowledge or information whether he had it for his own use or intended it for sale or not, do you? A. I do not.

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SIDNEY M. BOWES, a witness called by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Scott.

My name is Sidney M. Bowes; investigator in the Alcohol Tax Unit for a little over two years. I was so employed on December 31, 1935.

On December 30, 1935, I was in the vicinity of 10838 Drexel Avenue where I observed movements of automobiles and persons beginning about 8:30 in the evening on till midnight and after. I first saw an old Chrysler car, I believe; I don't remember the license number on it. A Chrysler with no spare tire on it. It was there for a while, and after that, somewhere around 9:00 or a little after, I saw Dodge car license number LX-418, a green sedan. When I first noticed the car it was parked in the street in front of the place. At about 10:30 I saw a man I later identified as Hyman Scher, the last man on the far side of the table, drive that car away. He came to the car from the house, carrying a package of the same size and shape and color that I later seized from him. He had just one package. He placed that in the car, got in himself, and three women, who came from the house with him got in the car also, and he left.

About around midnight the car came in again, the same car. I don't know who was driving it when it came in. I saw it arrive at the premises, and I saw it proceed to the rear of the drive, and I saw three women, apparently the same three women who had left in the car, come from the rear of the house around and entered the front door. Another man was with them. I then went down and made further observations closer to the premises. It was a very cold night, snow on the ground, the garage doors of a single garage in the rear of the premises was open. This car had stopped at the rear corner of the house on the drive. The lights were out on the car.

I returned to Mr. Williamson in the government car a short distance, about 200 feet down the street, and saw Williamson come down in the vicinity of the premises and remain a few minutes, and then return and rejoin me. It was around 12:30 or a little later, perhaps, I saw this same car leave those premises. It appeared to be heavier with the one man, the driver, in it than it had when it had left and returned, with the three women in it.

I followed this car west on that street, and it turned north to a near-by filling station. We followed it, and as we approached it in the filling station Scher was in the act of leaving the car and an attendant apparently put gas in it and Scher returned to the car from a store across the street, got in it and drove away, and we followed. We followed it up the street, that is, up, I should

say south, several blocks and then it turned right. This was the car that we had information about would take a load of whiskey, as we called it "phony" whiskey, from the premises from which we had followed it; that was the reason for us following it. It turned up a side street. We were gaining on it then, the streets were slippery, and it then swung into a driveway alongside a house. Investigator Williamson was driving the car, and he slowed it in front of this drive, and I dropped out and went back in the drive.

The car had entered the garage, and I approached the car; his headlights were still on. Mr. Scher had just stepped from the car. I said, "I am a federal officer. We have a tip this car is hauling whiskey." And he said, "Just a little for a party." I said, "Is the tax paid on it?" And he replied, "It is Canadian whiskey." I said, "Is it in there?" And I pointed to the trunk of the car. And he said, "Yes." I turned the handle and opened the trunk and found the trunk completely filled with packages wrapped in brown paper, and tied with twine; I think somewhere around thirty packages, each one containing six bottles. We didn't examine them all then. I saw several of the bottles and noted that they contained spirits and that there were no tax stamps on them. We placed Mr. Scher under arrest and with other officers we took him and the car away. The car contained a total of 88 bottles of tax unpaid spirits. There were 36 bottles of those imitation Holland gin in a sort of jug bottle.

Mr. Doyle: I object to the words "imitation Holland gin."

The Court: Overruled. Proceed.

Mr. Doyle: Exception.

(Narrative continued) I don't recall the exact number. There were some imitation Vat 69, and some imitation of White Horse Scotch Whiskey. I believe there were two other types of bottles, the brand names I don't recall.

When the car first left the Drexel Avenue house we were approximately a third of a block behind it, and we just about maintained that distance until it went to the filling station. Of course it stopped there and we came up and arrived about opposite about when he was leaving, and we took a post of observation down the street, saw him come back, and when he left we were about 100 yards behind him. That varied as we gained on him.

When he turned in the drive at the house where he was arrested, I should say he was 50 yards ahead, more or less. I saw the defendant as the only occupant get behind the wheel at the gas station and drive away. I could see one person in it. As he went back to the drive, he was the only person in it, and behind the driver's wheel.

Neither the packages found in the car nor the bottles had any internal revenue stamps.

CROSS EXAMINATION by Mr. Doyle.

Our car was approaching the same corner when Scher drove down to the gas station. While he was out of his car across the street we moved by that corner. He came out of the car, went towards the opposite corner, and we continued by the station and took a position to the north of the station, awaiting his return. I should say perhaps 75 yards, more or less, north. We were not directly opposite, across the street. I remember testifying at a previous trial of this case. I testified, and it was a fact, that we parked our car on the opposite side of the street; but it was not directly opposite the gasoline station. Our position was on the west side of the street, on which the gasoline station stood, but it was not directly across the street; that is, at right angles to the gasoline station.

I received a tip that "phony" liquor would be hauled away from the Drexel Avenue premises in that car. We got some information about the place around 4:00 in the afternoon, and some in the evening. We got further information while we were out there, around 8:30 or 9:00. It came from a source that had previously given us reliable information, and considered by us reliable. We have means of knowing whether information we receive is reliable if we had a previous experience with information from the same source, as we had in this case.

Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.

The Court: Objection sustained.

Mr. Doyle: May I be heard on that?

The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine.

the question. I have examined it again within the last 48 hours.

Mr. Doyle: May I dictate my offer?

The Court: Certainly.

Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable.

(Narrative continued) As the Scher car left Drexel Avenue it started from a stop, of course, gradually increasing speed to the corner, and as it proceeded down to the gasoline station it had probably reached a speed of 25, 35 miles an hour. It would be impossible to get up excessive speed in the distance. There was no movement he made other than the man would make going from one place to another. There were no suspicious movements that he made with his car. After he filled with gas at the station I should say he may have reached a speed of 40 miles an hour. He gradually reduced speed until he got to 10025 Olivet. It seemed like a rapid swing in the driveway, but nothing in particular. It was a glimpse I had as he went into the driveway. The man was, I should say, 25 or 30 yards ahead of me, and swung in there, I should say a rapid swing, a right angle turn on a slippery street, didn't skid any. That is as near as I can describe it. He could not have maintained his direction at 15 miles an hour on those streets, I don't think; it was less than 15. There was nothing suspicious in his turn in the driveway. He drove in and drove into his garage, which is about six feet from the house. I didn't know at the time it was his home.

As he drove in and got out of the car I approached. He was standing at the back of the car, I believe. I told him I was a federal agent and had a tip he had some "phoney" liquor with him. I asked him if it was in there, pointing to the trunk. I opened the trunk. I don't think it was locked; it opened easily with my hand. There was a handle right in the center of the trunk. I just turned it and opened it. I didn't need any key to open it. After that I arrested him and went out to Bratenahl station.

Up to that time I had heard nothing about trafficking in liquor at that address. I had never heard anything

about Scher. This is my first experience with him. I hold no animosity towards him personally, none whatever. I am interested in the prosecution of the government.

After the first trial of Scher I further investigated his activities. To that end I proceeded to Charleston, West Virginia.

Q. And did you procure some information which you considered reliable and confidential concerning Scher's activities?

(Objection; sustained; exception.)

When we arrested Scher there were 88 bottles in the trunk and two on the seat.

RE-DIRECT EXAMINATION by Mr. Scott.

In following Scher over to Olivet Avenue I tried not to give him any indication we were following him.

Mr. Scott: We rest, with this exception. Mr. Doyle has stipulated that the liquor seized at that time was distilled spirits made for beverage purposes.

The Court: It is stipulated that the liquor seized is distilled spirits fit for beverage purposes.

Mr. Doyle: Now, if the court please, the defendant moves for a directed verdict.

The Court: I will not hear from you. You may save your point. Your motion is overruled and you may have an exception.

Mr. Doyle: Motion for directed verdict on the ground no venue has been shown.

The Court: We will not, of course, have that small matter bother us in the future. If you insist upon it, the case will be opened up and one of the agents take the stand.

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EARL WILLIAMSON, being recalled, testified as follows:

This seizure of the liquor and transportation of the liquor happened in the city of Cleveland, Cuyahoga County, State of Ohio.

The Court: Was that the only ground of your motion? If it was, you had better add some other ground, I suppose, now that that is covered.

Mr. Doyle: We further move for a directed verdict on the ground that no offense has been shown to have been committed.

The Court: Motion overruled. The defendant has his exception. (Exception by defendant.)

## DEFENDANT'S TESTIMONY.

Herman Scher, a witness called by defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Doyle.

My name is Herman Scher. I live at 10025 Olivet, Cleveland, and am the father of the defendant here. I have lived in my home at Olivet 17 years. Living there with me at the present time are Hymie, Willie, Ernie, and Edith, also my wife. The same children lived there December 30 and 31, 1935. I was at home the night Hyman was arrested.

In the house we always drink whiskey, all, the whole family.

Q. Was six cases of whiskey a reasonable or unreasonable or customary or uncustomary amount of liquor for you to have in your home? A. No.

Q. What is the practice in your home: What was it at that time in December 1935 as to entertainment? A. At that time I had two cases in the house.

(Narrative continued) We did a lot of entertaining. I entertained and the children. I have only one other son who lives in the Heights, is married and has a family. He would entertain in my home. We do the most entertaining Saturday nights and Sundays, some times the middle of the week. On Sunday we would have from 20 to 30 people, some times more.

On the New Year's Eve party there were over 60 people. Liquor was served at our various parties.

We never go to cafes and restaurants; we always party at the house. We sit and talk and drink and dance. There is no drunkenness there.

There was never any liquor for sale in my home at 10025 Olivet Avenue. My son Hymie, the defendant, never sold any liquor that I know. I did not know of his having any at home or elsewhere for sale, or for the production of any products from it; never sold a drop in his life so far as I know.

CROSS EXAMINATION by Mr. Scott.

At these parties we had from 20 to 30 people. We have parties Saturday and Sunday, some times in the middle of the week. There was a reason for those parties because I belong to a society they call "Good time Society." They have good times, eat and drink and sing and dance. We pay for the parties myself, because every week we go to a different house. In that lodge is 150 couples. I don't have the whole bunch, only the executive board members.

We have an eight-room house. That is the upstairs and three rooms on the third floor, on the attic. I live on the second floor. A family named Prottman lives on the ground floor. He is no relation.

Sometimes we would have forty people, board members there. There was liquor served. There never was drunkenness in the house. We would have two or three cases of liquor on hand to serve forty people. We would get rid of all the liquor at one time. They would drink it all but there was no drunkenness. We put all these people on the second floor. I never testified we had as many as 150 people there at one time.

I was home the night the federal officers came there and seized the car in the garage; it was 12:30. They didn't come in the house.

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MRS. LILLIAN SCHER, called as a witness by defendant, and first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

I am the wife of Irving Scher and brother-in-law of Hyman Scher, the defendant. I live with my husband at 2477 Overlook Road. On December 31, 1935 my husband and I lived at 10025 Olivet. Living at that time at that address besides myself and my husband were my mother-in-law, my father-in-law, my brothers-in-law Hyman and William, and my sister-in-law Edith: seven in all and one servant, a maid who slept elsewhere.

On the night of December 31, 1935 there was an entertainment planned for the Scher home. There were present ten of our immediate family, and during the course of the evening there were 90 or 100 people there. A few of them didn't stay there long, but I would say during the whole course of the evening about 60 or 70 stayed the whole full time of the party. There was the ordinary procedure at a New Year's Eve party,—ate,

drank, danced, played musical instruments. My mother and father were there.

I lived at the Scher home on Olivet from June 23, 1935 until January of this year. We were married June 23rd and moved in there then. I had known the Schers seven years before that and would visit there very frequently, two or three times a week.

Q. Can you tell us what the general custom in the Scher home was in December, 1935, and some time previous and thereafter as to entertainment? A. There was a lot of entertaining at the house always, especially after I was married.

Q. And how many people usually would attend those parties? A. It all depends on the nature; whether we were having a card game or just a social event having the family and friends over. My in-laws are very cordial people and there is always a lot of company.

Q. How often would these parties take place? A. I would say two or three times a week on an average.

Q. They would consist of friends, business acquaintances? A. Yes, sir.

(Narrative continued) The defendant was then in the hat business at 1102 Prospect with my husband, the New England Hatters. Samuel Scher and Willie Scher were in the automobile business. The father, Herman, used to help my husband in the store. When he wasn't needed there he would help around at home. He is now in the drygoods business, has a little store at the market.

The custom of the Scher children was not to frequent movies, roadhouses, but we always entertained at home and had our drinking at home.

The New Year's party started at ten-thirty and eleven. There was liquor served then. My husband and Hymie were to arrange to get liquor for the party. I don't know where they got it or what arrangements were made.

Cross Examination by Mr. Scott.

Before I was married I wasn't at the Olivet Avenue home all the time but a lot of the time. After I was married I lived there all the time. I was at most of the parties held when I lived there. They were in the evening on week ends and during the week. Generally there were twenty or thirty people there, sometimes maybe forty or fifty. New Year's Eve in 1935 there were surely 100 people there during the course of the evening.

This is a nine-room house; it is a large place. I would say there was about two cases of liquor consumed New Year's Eve. I believe there was a case in the house and I think, I am almost certain, that Sam, my brother-in-law, brought some, and then of course some of the guests had some with them. There couldn't very well be any drunkenness there, not with that many people. My husband and my brother-in-laws were supposed to contribute towards the party and towards the liquor and refreshments. I didn't pay any money towards it; my husband takes care of my finances.

Entertaining was the purpose of all these parties. After I was married I owed a lot of people invitations who were very nice to me before we were married. My husband is in a business where he deals with men and it is very common to be very cordial, invite them over and be friendly with them. He deals with men almost entirely in his business. It is very natural to say to a good customer or acquaintance of yours, "Drop over and have a drink. Come over some night and play some cards." That is only natural.

I couldn't say how much liquor there was in the house every time there was anyone there, but we always had liquor in the house. The boys bought some from time to time. My brother-in-law Sam, being in the automobile business, would occasionally make a deal on a car where he would take in liquor as part payment. That was legal liquor.

On New Year's Eve 1935 I am positive there was at least two cases of liquor, and that would be 24 bottles. Then there was some brandy; besides a few some of the guests brought out with them. I saw that many bottles about eleven or eleven-thirty. As to them being all filled, you don't pay particular attention to a thing like that. I can't say whether they were all filled at that time.

By the Court:

Q. What do you say as to the custom in your father-in-law's home about using illegal liquor for these parties: any such custom as that? A. No, sir.

Q. That never happened? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Doyle.

Illegal liquor would be liquor that is made contrary to the laws of the government and without the taxation that is applied or imposed upon it. I don't pay partic-

ular attention to see what kind of liquor I am getting. I felt over the cap the stamps, things of that kind.

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DR. JOHN J. COAN, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Dr. John J. Coan. I am an osteopathic physician and surgeon in the Osborn Building, residence 3428 East 147th Street. I have practiced here sixteen years.

I have known the defendant eleven or twelve years. I know what his general reputation is in the community where he resides as being a law-abiding citizen. I would say that general reputation is good.

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CHARLES KEELSON, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Charles Keelson; address 20808 Mayfield Road. I am manager of the Knobby Clothes Company at 1044 East 105th Street, and have been so engaged the past twenty years.

I have known the defendant about eight or ten years. I know what his general reputation is in the community for being a law-abiding citizen. That reputation is good.

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SAMUEL SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Sam Scher; residence 12378 Reynard, University Heights. Since 1928 I have been an automobile dealer here in Cleveland. I am a brother of the defendant.

It has been eight years since I lived at 10025 Olivet, since I married. Previous to that I lived there.

Q. Do you know what the general custom was in the Scher household on Olivet Avenue as to entertaining? A. Well, we always have had entertainment there, business associates; we used to have friends.

Q. Who would do the entertaining? A. Well, we would all do it. I would do some of it; my other brothers, and my dad.

Q. How often, as a general custom, would you have entertainment? A. I would say there was always somebody over; usually on Saturday and Sunday we would have quite a crowd of people there.

(Narrative continued) We always done our entertaining at home. We didn't frequent roadhouses or cafes very often; once in a great while. At the entertainments at the Scher family home on Olivet there would be thirty, forty or fifty people there at one time. There has been close to a hundred. They would be friends, acquaintances, relatives, club members. We would have good times. We would serve lunch, serve little drinks, and have singing and dancing.

We have always had liquor in the Scher home. It wasn't unusual to have six or seven cases of liquor at one time.

I remember the occasion of my brother's arrest on December 31, 1935. In the evening of December 30th there was an arrangement with Hyman about the purchase of liquor. I think it was between nine and nine-thirty that Hyman came to our house. At that time I lived on Euclid Boulevard. He told me I could buy some liquor cheap, if I would entertain the idea of going in and buying it with him. We always have been doing the same thing. And I told him O.K. I asked him if the stuff was all right. He said it was all right. I said, "Go ahead and buy it." He said, "Have you any money?" I said, "Yes. How much do you need?" He told me I should give him as much as I can. I think I had $50 or $60. I gave it to him and told him to go ahead and buy it, and told him to take it to the house; we were going to have a party the next day and have use for it. That is all the conversation pertaining to that particular deal. We had bought liquor in quantities before, sometimes as high as ten cases. Pardon me, that was taken in on deals they have made on automobiles.

We are in the automobile business; we sell cars to everybody. A lot of times these fellows would come in and want to know if we would trade a car or take the down payment in whiskey. When we took that liquor in it would be sent out to my father's house and we would consume it at the house. That was the general custom; we kept all our liquor there. We did all our entertaining there.

CROSS EXAMINATION by Mr. Scott.

It was on the 30th, not the 31st, we were going to buy some liquor, about six or seven cases. I don't know where we were going to buy it. All I know is my brother told me he was going to buy some liquor and I was going to share in the cost. It was to cost around $150. I had either $50 or $60 I was going to give him. It was supposed to be good whiskey; either six or seven cases. I would consider that good liquor at that cost. There were state stores in existence at that time. He didn't say he was going to buy the liquor at a state store.

Q. So you knew at the time he was going to buy improper liquor?

(Objection; overruled; exception.)

A. No, I didn't.

Q. If you didn't know the liquor was going to be bought at the state store, where did you think it was going to be bought? A. I didn't know.

(Narrative continued) I don't know right now how much liquor costs in a state store in cases.

It was not my general practice to take in liquor in exchange on automobiles.

I was at this New Year's Eve party with my wife and friends. On and off there must have been pretty close to a hundred people coming and going. I really don't know how much liquor I observed at that time.

This is a pretty large size house—eight or nine rooms. We didn't have anybody outside to handle the traffic, all these people that came there. We should have called the policeman but we forgot.

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WILLIAM SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is William Scher; residence 10025 Olivet. I am in the automobile business; Boulevard Motor Sales, 117th and Euclid.

Q. Do you know what the general custom is in the Scher home on Olivet Avenue as to entertaining and having parties? A. Yes, sir.

Q. What is the general custom there as to parties and entertainment? A. Well, we generally have parties there twice a week, mostly on Saturday and Sun-

day, and we entertain. We have a lot of friends here and relations we entertain during the course of the evening. There would generally be about 35 or 40 people, sometimes a little less, maybe a little more.

Q. Any of the Scher children make a custom of entertaining or going to roadhouses or cafes? A. No, they don't.

Q. You do your entertaining where? A. At home.

(Narrative continued) It is not out of the ordinary to have five or six cases of liquor in the Scher household at any time.

We had a party New Year's Eve of 1935. There were a number of people there.

I never heard of any liquor being sold at that place. I never heard of Hyman being engaged in selling liquor or interested in the manufacture of any articles containing liquor.

CROSS EXAMINATION by Mr. Scott.

I was there at the first part of the party on December 31, 1935. I was there around an hour or hour and a half and I left. When I was there there must have been close to about a case of liquor. I would say that in round numbers. I don't know the exact amount. I think we had that liquor in the house. I don't know where it was bought. I never knew where the liquor came from. I didn't pay for any of the liquor.

It was the following morning I heard about my brother being arrested. I knew the kind of car he was driving; license LX-418. That car was in my name at that time, the bill-of-sale. I didn't sign the name William Scher on the bill-of-sale but I authorized it. Hyman, the defendant, signed it. He asked me if he could buy the car in my name, I said O. K. He was my brother. I don't know why he couldn't buy the car in his own name.

I didn't know of my brother Hyman being engaged in any illegal liquor transaction about that time.

I wouldn't call the drinking there heavy drinking. When we have this entertainment everybody has a few drinks and they feel good. As far as drunkenness, there is not anybody gets drunk.

Some of the men who belong to the club my father belongs to were there that night. These people have what they call a standing invitation to our house. I don't know who pays for the liquor they drink. I don't know whether my father pays for it.

IRVING SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Irving Scher. I live at 2477 Overlook Road. I am owner of New England Hatters, men's hatters, at 1102 Prospect Avenue. I am in the business of renovating and making men's hats and have been so engaged the past three years. I was once associated with Danbury Hatters and Bill Taylor Hat Company.

At one time my brother, Hyman, was my partner, but he is not now. He left when he got the job with Jonas & Company.

On December 31, 1935, I lived at 10025 Olivet Avenue with my parents. I am married, and my wife is Lillian Scher. Prior to December 31 I had lived on Olivet 14 years. I know the general custom of the Schers as to entertainment. W did quite a bit of entertaining. That was practically every Saturday and Sunday. We would have a few drinks and sing and dance and play the piano, play the violin; everybody having a good time. There was never any liquor sold there to my knowledge. I never knew of Hyman Scher selling any liquor.

It was not unusual to have as much as five or six or seven cases of liquor in the home at Olivet. My brothers Sam, Hyman and myself would buy it. Sometimes I didn't have to buy it. They all drank in a moderate way.

I recall Hyman's arrest on December 31, 1935. It was about ten or ten-thirty in the evening of December 30 my brother Hyman came home and he brought a case of liquor up with him. He removed a bottle and asked me to taste it, see whether I liked it. I had one taste and I said, "That is pretty fair." He told me he can get a pretty good buy; he can buy six and a half or seven cases of liquor. I didn't ask him where. My brother said, "I have just come from my brother Sam's house and Sam is contributing some of the money to help buy the liquor." He asked me if I could. I said, "Yes." I think I gave him about $40 or $42. I contributed to buy the liquor, and he went away. He is to bring it back to the house. We were having a party that night—rather New Year's Eve, and it was to be used for that party and other parties, we usually have on Saturdays and Sundays.

CROSS EXAMINATION by Mr. Scott.

As to the circumstances of my family in December, 1935,—I wouldn't call them poor. I wouldn't call them rich. We managed to stay out of the bread line, if that is what you mean. It is true we had 48 bottles of whiskey at one time in our house. I meant we were living moderate. After all, I had a business, I was making a living out of the business. My brother Sam was working. There was many times my brother Sam was taking liquor on an automobile deal; and that would be brought over to our house.

My brother Hyman was in partnership in my business. We were making a living. Hyman was in the dress business. He lost the business. His credit was no good. That is why he bought the car under my brother's name.

I was at the party on December 31, 1935. I imagine, all in all, I am not a very good guesser of people, didn't stop to count them, but there was very close to a hundred people there during the whole evening. By that I mean there were times people came in, wished us Happy New Year, and had a drink and walked out. I mean there were not a hundred there all assembled. I was there all evening. We had a case left there the night previous by my brother Hyman. That was the case we took that bottle of so I could taste it. I didn't stop to look at it to see whether it was legal liquor. Legal liquor is liquor that has the government stamp on it; internal revenue stamp attached on the bottle. I didn't stop to look whether there were any internal revenue stamps on the bottles. He didn't say anything to me about where he was buying it; I didn't ask him. He said he could make a good buy.

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EDITH SCHER, a witness called by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Doyle.

My name is Edith Scher. I am a sister of the defendant and live at 10025 Olivet Avenue. I have lived there 17 or 18 years. My business is that of sales lady at the Bailey Company and I have been so engaged a year and a half. I am 24 years old.

Q. Do you know what the general custom was in your house as to entertaining? A. Yes.

Q. You tell the court and jury just what your custom was; who would be there? A. Well, maybe once or twice or even three times a week our friends, family and relatives, would get together. That would be Saturday night or Sunday night, or once during the week. We would play cards, serve a few drinks, just have a nice time.

(Narrative continued) To my knowledge there was never any liquor sold at the Olivet Avenue home. To my knowledge Hyman never sold any liquor, engaged in any liquor sale.

We Scher children very very seldom go to roadhouses or cafes. We would rather enjoy ourselves at home. We have our entertainment at home. It was not out of the ordinary to have four or five or six or seven cases of liquor in the home on Olivet Avenue at one time. My brothers would get together and they would all pitch in and buy it.

We had a party New Year's Eve. There was about sixty people there all the time; close to a hundred walking in and out. The party lasted till about five or five-thirty. We danced, drank, played cards, talked. There was no drunkenness or anything like that; just sat around all evening and sang.

Cross Examination by Mr. Scott.

I work in the day time. I was at the party on December 31, 1935. At one time there were sixty people there, but there was people walking in and out, I would say there were close to a hundred. I saw liquor there, but I don't know how much. I didn't count it. There was plenty of liquor there.

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Hyman Scher, the defendant, offered himself as a witness, and being first duly sworn, testified as follows:

Direct Examination by Mr. Doyle.

My name is Hyman Scher. I am the defendant in this case; am 29 years old; and live at 274 Shady Avenue, Pittsburgh. I am manager of the Jonas Shop there, dealing in ladies ready-to-wear and millinery, on Fifth Street. They have a chain of stores, about 23 in the western chain.

On December 31, 1935 I lived at 10025 Olivet Avenue. I was with my brother in the hat business at 1002 Prospect. I am single but I am contemplating marriage.

On December 31, 1935 I was arrested by officers Williamson and Bowes. I had with me seven cases of liquor. I bought that at 10838 Drexel Avenue, Cleveland, from a fellow by the name of Carr.

During the day I got into a conversation with some fellow down in the store. He said he knows where I can get some good whiskey. He went out to the Carter Garage and called and made an appointment, gave me the address to go out there. I told him I would be out there at a certain time. I went out there at nine-thirty. When I got there Mr. Carr stated he is going out of business and has an exceptional buy for me if I am interested. He said he has about seven cases and would give them to me at about 22.50 a case. I said I didn't have that much money but I think I can raise it between my brothers because we always go in partners. I took a case along with me, took it over to my brother Sam, told him about it. He gave me about $60. I stood around talking and then went over to my home to Irving, and I told him. We sampled the bottle. He thought it was good and he gave me about $40. I had the balance. I went back there. First I stopped to eat on East 105th Street there, kidded with some of the fellows there. I went back there about twelve o'clock. They told me to drive in this driveway, and I drove in and I got out and then I went in the living room. He loaded the car up for me and I paid him the money. I backed out and went down Drexel Avenue, went over to the gas station, got some gas, went across the street to buy a paper, got back in my car and I went home.

The liquor was in the trunk of my car, and the trunk was unlocked. I wasn't in a hurry and going down there I went at just a leisurely speed. After leaving the gas station I went directly home. I went into my garage. As I got out I see some fellow running towards me with a searchlight waving from side to side. When he gets up to me he says, "I am an Internal Revenue man. Have you got some whiskey here?" I said, "Yes, I have some whiskey for a party." He opens up the trunk. He took the lid right off the trunk and there is where the whiskey was. Then he took me out in Bratenahl. I was overnight in jail there.

Q. What was the general custom at your home as to entertainment? A. Well, we have done a lot of entertainment. Father had people to this Good Time society where they have their executive board meetings over there as his friends. Brother Irving is in business. We

are in the hat business, we have friends and they were always coming in. We have good times there, always have a few drinks, serve a little lunch; just get together all the time.

Q. What was the custom,—did any of your brothers and sisters or brother-in-laws and sister-in-laws go to roadhouses? A. We don't. We always think we would rather congregate at our house, because all of my brothers are musically inclined; one plays the violin, William plays the piano; we always gather there and have just as much fun.

(Narrative continued) There were usually twenty or thirty people there. At my brother's wedding reception there was about 150. He was married at our home.

There was nothing unusual in having five or six or even seven cases in the home. Sometimes we had much more. My brother would sometimes take whiskey in on deals in automobiles, bring it over to our house. One time he took in about ten cases on a deal. That was brought to our home to drink. It was for the family and friends that would come over.

Q. Did you ever in your life sell a single case of liquor? A. No, sir.

Q. Did you ever sell any liquor at all? A. No, sir.

Q. When this liquor was purchased did you purchase it intending to sell it? A. No, sir.

Q. Did you intend to use it in the manufacture or production of any articles for sale containing liquor? A. No, sir.

CROSS EXAMINATION, by Mr. Scott.

The car I was driving on December 31, 1935, was in my brother William's name. I did that because I was in the dress business at one time and after I had a robbery there my credit wasn't so good to warrant a new automobile. My brother's credit was all right. I asked him for his permission to buy the car. He said O. K. After all we were all together, it didn't make any difference in whose name the car was.

When I bought the liquor on December 31, 1935, I didn't pay any attention whether there was any internal revenue stamps attached to the bottles. I didn't know at that time that legal liquor could not be bought any place but in a state liquor store. I know there were state liquor stores.

Q. But you don't know liquor sold outside of state liquor stores was illegal?

Mr. Doyle: I object. It is not the law.
The Court: Overruled.
Mr. Doyle: Exception.

Q. I say did you know that the liquor that was sold outside of state liquor stores was, without internal revenue stamps, illegal? A. No, because this fellow said it was Canadian whiskey; he said it was Canadian bonded whiskey.

Q. So you thought it was bona fide liquor? A. Yes.

(Narrative continued) I was paying $145 for this liquor, for the seven cases. I said I was going to take that liquor over to Olivet Avenue for entertainment purposes. That is my home. There must have been about a case there before I went over to Drexel Avenue.

That night people came in; we didn't sit down and count them, but we expected a goodly number of people, probably about 75 to 100 people coming in and out, not congregating all at one time. The reason we bought the whiskey, the fellow sold me on a deal, because I went over originally to buy one case. He said I could get this very cheap. That is the reason I went ahead and purchased the whiskey. At that time my financial situation wasn't very good as far as credit was concerned. Credit is entirely different than money in your pocket. You can have money in your pocket and your credit won't be any good, when you default or something.

I considered this liquor a good buy. As to not knowing there were any internal revenue stamps on the liquor, —as I told you the fellow told me it was Canadian bonded whiskey.

Q. And the liquor you had been buying before for the other parties you speak of, where did you get that liquor?

Mr. Doyle: I object, if the Court please.
The Court: Overruled.
Mr. Doyle: Exception.

A. Got it from some fellows, certain fellows I would call up. I had the phone number of some fellow out on Kinsman.

Q. You don't know who it is? A. The name is Tony. I don't remember the phone number.

Q. You bought liquor on several occasions before this off of different people around town? A. Yes, whenever a fellow would come in the store I would buy some when I would happen to meet him some place.

Q. Would they be bootleggers? A. That I don't know.

Q. Do you know whether they were selling legal liquor? A. They always told me it was Canadian bonded whiskey.

(Narrative continued) At that time I was wo[illegible]ng at my brother's, New England Hatters, getting $25, $30, all depends. We withdraw whatever we felt we needed. If we needed more we would withdraw more.

The night when I left the house at Olivet on December 31 I returned and talked to my brother Irving with regard to buying the whiskey at a bargain. He gave me some money. I thought it was a good buy, I knew state liquor stores were in existence but I am coming back to tell you I was told this was Canadian bonded whiskey.

The Court: What does that mean to you?

The Witness: To me, it meant it was good whiskey.

RE-DIRECT EXAMINATION by Mr. Doyle.

At my dress store I had a robbery and after that robbery I just couldn't make a go of it any more. They took all my merchandise in the robbery. That store was at 965 East 105th Street, Cleveland.

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Defendant rested.

Plaintiff rested.

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The above and foregoing was all the testimony offered and received at the trial of the above entitled cause.

Thereupon adjournment was taken to the following day, whereupon arguments were had by counsel for the respective parties, and the court charged the jury as follows:

WEST, *J.* (Orally):

Members of the jury, the statute under which this indictment is drawn provides that no person shall transport or possess, buy or sell, any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal taxes imposed on such spirits. The provision of this

section does not apply to distilled spirits not intended for sale or for use in the manufacture or production of any articles not intended for sale.

The indictment charges that on December 31st, 1935, in this jurisdiction, the defendant knowingly and unlawfully possessed, in a Dodge sedan, License LX 418, a quantity of distilled spirits, being about twenty-four quarts of gin and thirteen and one-fifth gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of spirits therein and evidencing payment of internal revenue taxes, in violation of the provisions of the section which I have just read to you.

Count 2 charges the defendant with the unlawful transportation in the same Dodge sedan of the same liquor in unstamped containers.

The defendant has pleaded not guilty, and is presumed to be innocent of both of these offenses. You will not be justified in finding him guilty unless the evidence satisfies you of his guilt beyond a reasonable doubt. Proof of guilt beyond any possible doubt is not required, but only proof beyond a reasonable doubt. That is, you must be satisfied, before you can find him guilty, that the evidence proves such guilt to a moral certainty. If the Government's proof does not convince your minds to this degree, or if the defendant's evidence raises a reasonable doubt of his guilt, then you shall acquit him.

No presumption arises against the man because this indictment has been returned and he has been tried upon it.

The defendant admits, and the evidence clearly shows, that on the night in question he did have in his possession, and did transport as charged, the liquor named in the indictment; and it appears that the bottles did not bear the stamps required by law. The first question of fact for you to decide is whether the defendant knew before the officers searched this car that the ninety bottles in the car were unstamped. He says he did not. But, notwithstanding that, the other facts and circumstances disclosed may convince you that Scher is falsifying; that he did know and must have known that this was illegal liquor on which the tax had not been paid, and, consequently, that no tax stamps were on the bottles. You are to weigh his assertion that he did not know against other evidence and circumstances, if there are any, tending to prove that he must have known, and

from all of the evidence are to determine where the truth lies.

Hyman Scher is of mature age, intelligence, and was in business with one of his brothers. In December, 1935, he testifies that an unknown man, whom he knew only as "Joe," I believe, came to the hat store and told him that good liquor was to be had at a certain address on Drexel Avenue, at a great bargain; and that when the defendant showed his interest in the matter, this unknown man went to the telephone, and, as I remember, made a "date" for the defendant to visit the party on Drexel Avenue. He says that he drove out that night and went to the place and interviewed a man named Carr, who told him he was selling out his business and could let him have seven cases of Canadian bonded liquor at a very low price, $22.50 a case, and he says that as he and his family were much given to generous entertainment, and were planning to hold a party for the next night, he thought well of this offer and so took a case as a sample, loaded it into his automobile, and drove to his home on Olivet Avenue to get his brother's opinion, and that there the whiskey was sampled and its purchase decided on.

At this point a matter appears which you should consider. The officers, or one of them, testified that when the Dodge car first appeared at the Drexel Avenue place, it was not driven in but was parked in the street. The driver entered the house and shortly emerged with a package like those later found in the car, but that there were a great many of these packages in the car,—some thirty, I believe they said. So that if this is true, and I believe Scher did not deny it, one package might not contain twelve bottles, for the whole number of bottles found in the car was ninety, and a case is said to contain twelve bottles.

Again, the officers say, and it is not contradicted, that three women came from the house with Scher and drove away with him and returned with him when he returned. Now, the defendant says nothing about these three women, and it may seem strange to you that if he did, in fact, drive to see his brother, and take the liquor to him for inspection, neither he nor his brother have remembered, or at least have not given any account, of the three women; nor have any of the women been produced to contradict these witnesses,—to corroborate these witnesses. Of course, it is possible they may just have gone for the ride and remained in the machine while the

defendant took the whiskey into the house on Olivet Avenue to exhibit it to his brother, who knew nothing of the women being outside in the cold. That would explain the brother's failure to mention that, but would not, as I see it, account for the failure of the defendant to either produce them and have them tell where he took them and so substantiate the story of the visit to the brother, or else explain why they are not produced.

The Government is not shown to know who these women were or to be able to produce them. The defendant and his counsel would hardly overlook a matter so vital to the defendant,—I say "vital," because Scher and his brother both testified that it was when the defendant brought the sample case to their home on Olivet that the purchase of the seven cases for the New Year's party was decided, and it was there that the defendant secured funds to help pay the price of $145.00, and any evidence that such a visit was made would tend to corroborate that.

While the failure to produce corroborating testimony or account for its absence may well be thought by the jury to cast a grave doubt upon their story, the effect, of course, of these discrepancies, if you find they exist, is entirely for the jury to decide.

Now, getting back to the question whether Scher knew the bottles were not stamped: if you accept the testimony that he did take a case to his brother, then it appears that a bottle was opened by them and one or more drinks taken, and, although the testimony shows that these stamps are applied to the cork, Scher insists he did not notice the absence of the stamps. Again, you should consider that the two trips to the Drexel Avenue house were made at night to get a bargain at a private home, and not a lawful liquor store. Now, under those circumstances, was it at all probable that the defendant expected this bargain price liquor to be lawful liquor on which the tax had been paid?

He said that Carr assured him it was Canadian bonded goods, but it seems to me evident that Scher did not understand from that that it would be tax paid, for he testified that to him "Canadian bonded whiskey" meant simply whiskey of a good quality.

From all of the testimony bearing on the point, and giving effect to the reasonable inferences to be drawn from such facts as are either admitted or proven, what do you say? Did the defendant know and appreciate that the bottles were not stamped? If he did not, your ver-

dict must be not guilty; but if he did, then you should consider the affirmative defense which the defendant also advances.

The statute involved here which prohibits possession or transportation does not apply to distilled spirits not intended for sale or for use in manufacturing or producing articles intended for sale, and it is the contention of the defendant and his counsel that the defendant bought this liquor not for sale but for the use of himself and his family and friends, and, consequently, that the statute has no application to him. This may be called an affirmative defense, and upon this issue the burden does not rest upon the Government, but the defendant has the burden of showing by the greater weight of the evidence that although the taxes had not been paid and the containers bore no stamps, yet the statute did not apply against him because he did not intend to sell the liquor or use it for making some article for sale.

The law is that when one is found transporting distilled liquors in unstamped containers, and, therefore, prima facie committing an offense, he would be required to explain why he should not be regarded as a violator, and the burden of proof rests on him to make a satisfactory explanation by proof to a jury that the spirits were not intended to be sold or used to produce articles for sale. He is not required to prove this beyond a reasonable doubt, but he is required to prove it by the fair preponderance of the testimony.

Now, Scher testifies, and in this he is supported by several members of his family, that he had this liquor solely for their personal consumption and entertainment of their guests. The Government, in the nature of things, cannot produce direct evidence of the man's purpose and intention when he bought the liquor. As in most such cases, the Government relies on circumstantial evidence, which may properly be received and considered by the jury in this case. Among the circumstances to be considered are the time, place, and the nature of the place, and the method employed in securing the liquor.

Scher was using an automobile bought by him in his brother's name and licensed in the name of his brother. He has an explanation for that, which you will consider, giving it such weight as you think it is entitled to. He acted on information from a man said to be unknown to him. He drove to this private home in the night. He left with three women, and Scher returned, drove into the yard to get the load, but extinguished the

lights on his car while it was being loaded, and bought seven and a half cases, or ninety bottles of liquor put out in unstamped bottles, marked and labeled as being very well known brands. Would a man, or three men, in the situation of the Schers, be likely to spend $145.00 at one time for liquor for their friends and family, when they then had, according to the testimony, at least a case available for use in their house?

The Government does not claim that any one of these circumstances disproves Scher's assertion, but it does contend that when they are all taken together, they do refute it.

It is not contended that the defendant expected to sell this liquor at his home on Olivet; that a bootleg joint was conducted at this place. If the defendant, in other words, was to sell, it would make no difference when or where or to whom the proposed sales were to take place; and of course you all appreciate that bootleggers oftentimes ply their trade in various ways without having any fixed location for the operation of their business.

You will also consider the testimony as to the habit of entertaining at the Olivet Street home. I need not repeat that evidence. Just how much truth or probability there may be in it, in the testimony of the father and the others of the members of the family upon this point, is for you to say.

And as to all of the testimony the jury is the sole judge of its weight. So, too, you are to judge the credibility of the witnesses. In general, you may consider the appearance and demeanor of the witnesses; his frankness or lack of it; the reasonableness or unreasonableness of his story; and the interest he has in the outcome of the case; whether, because of relationship to the defendant, or otherwise, and from all of the testimony touching these matters, it is for the jury to say just what weight, if any, you will give to the evidence of any witness. But, more specifically, if you find that the defendant, or any other witness has wilfully and knowingly testified falsely to a material matter, you may disregard all of his evidence. For example, if when the defendant testified that he did not know that the containers of the liquor were not stamped, he wilfully testified to what he knew to be false, you have the right to reject not only that evidence, but all of the rest of his testimony, as well.

I have followed the custom in Federal courts to briefly relate to the jury some of the more important testimony,—not to interfere with your function as triers of

the fact, but only to help you to remember and apply that evidence, for you are the sole judges of facts and are not bound to follow any view of the Court as to them; and you should consider all of the evidence, not merely that of which I have spoken. And if your memory differs from mine, you are to take the testimony as you recall it.

You must not be influenced by any bias, prejudice or sympathy, either for or against the defendant. For example, he testified that he expects to be married soon. Whether that was intended to arouse your sympathy, I do not know, but at all events, the defendant's matrimonial plans and the probability of it being interfered with are not to be given any consideration or any weight whatever by this jury. It is not concerned with the result of the verdict or how it will affect the defendant, or anyone else.

The evidence has been received to show the defendant's good reputation. Such character evidence, so-called, is allowed on the theory that one having a good reputation or being a law-abiding citizen is not so likely to commit a crime as one who does not enjoy such a reputation, but the weight of such evidence is entirely for the jury, and no reputation, however good, will excuse a crime, even a first offense.

You may find the defendant guilty or not guilty on both counts; or guilty of one and not guilty under the other. Although, I suppose, that if he is guilty of possession under the first count he must necessarily be guilty of transportation under the second. However, that, as well as all other questions of fact, I now submit to you for your decision.

After retirement, you shall select one of your number foreman. When you have unanimously agreed upon a verdict, verdicts in the Federal Court must be rendered by unanimous agreement of all of the jurors, you will have the foreman,—and only the foreman,—sign the verdict upon which you have agreed, and return it into open court.

Is there anything further, gentlemen?

Mr. Scott: Nothing.

Mr. Doyle: Nothing.

The Court: You may retire and consider the case.

Mr. Doyle: Note a general exception to the Court's charge.

Thereupon the jury retired and later returned into court with its verdict in favor of the plaintiff and against the defendant, as appears of record herein.

Thereupon the Court entered judgment upon said verdict, as appears of record herein, to which action of the Court the defendant duly excepted.

Thereafter and within three days after the rendition of the verdict and entry of judgment, the defendant filed his written motion for a new trial, which motion was overruled by the Court, to which ruling of the Court the defendant excepted.

Now comes the defendant and presents to the Court its bill of exceptions, in narrative form, taken on the trial of said cause, and the Court, upon consideration thereof, finds the same to be a true, correct and complete bill of exceptions, and the same is hereby allowed and signed and ordered to be filed as part of the record herein this 8th day of June, 1937.

S. H. West,
*Judge.*

## ORDER APPROVING BILL OF EXCEPTIONS.

(Entered June 8, 1937 by S. H. West, Judge.)

Now comes the defendant and presents to the Court his bill of exceptions in narrative form, taken on the trial of said cause, and the Court upon consideration thereof finds the same to be a true, correct and complete bill of exceptions and the same is hereby allowed and signed and ordered to be filed as part of the record herein this 8th day of June, 1937.

## ASSIGNMENT OF ERRORS.

(Filed June 5, 1937.)

The defendant in the above entitled cause files the following assignment of errors upon which he will rely in the prosecution of his appeal herein from the judgment and sentence of this Court, entered the 7th day of May, 1937:

1. In that the Court erred in denying the defendant's Motion to Suppress the evidence and return the property seized, for the following reasons:

(a) Because the search made of the premises and the seizure of the property was unlawful, in that the Federal officers making the search violated Section 14, Article 1, of the Constitution of the State of Ohio, and the 4th and 5th Amendments of the Constitution of the United States.

(b) Because the search of the premises was unlawful, in that the Federal officers had no special cause to justify a search of said premises.

(c) Because the search of the premises was part of a private dwelling and was made without a search warrant and was not incidental to any lawful arrest.

(d) Because the Federal officers used the information they obtained by their unlawful search and seizure as evidence in said cause, in violation of the defendant's constitutional rights.

(e) Because said premises were searched without a search warrant and without probable cause to believe that a crime was being committed at the time the search was made, in violation of the rights of the defendant under the State and Federal Constitution.

(f) Because said Federal officers, who made the search, were trespassing upon the land of the defendant, within the curtilage of his dwelling-house, when they alleged they discovered facts, by reason of which they claim probable cause for the search of the premises.

(g) Because the search was made without any warrant for the arrest of the defendant.

2. In that the Court erred in its ruling, sustaining the objections to the following evidence, to which ruling the defendant duly excepted:

"Q. Did you receive any information which you considered reliable concerning his actions in Charleston, West Virginia?

Mr. Scott: I object, your Honor.
The Court: Objection sustained.
Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: Exception."

(Page 29, Narrative Bill of Exceptions.)

The sustaining of the objection to the above evidence is assigned as error, first, for the reason that on cross examination the defendant was entitled to test the ability of the witness to determine whether or not his alleged information was reliable, and so that the Court and jury might determine whether or not the witness had reasonable cause to believe this informer, and whether the officers were justified in their belief; and secondly, the defendant was entitled to know the name of the informer so that he might impeach the testimony of the Government witnesses.

3. In that the Court erred in its ruling sustaining the objection to the following evidence, to which ruling the defendant duly excepted:

"Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: May I be heard on that?
The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I have examined it again within the last 48 hours.
Mr. Doyle: May I dictate my offer?
The Court: Certainly.
Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable

at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable."

(Pages 34 and 35, Narrative Bill of Exceptions.)

The sustaining of the objection to the above evidence is assigned as error for the following reasons: First, that the defendant was entitled to know the name of the confidential informer, so that the Court and jury might determine whether or not the officers had reasonable cause to believe this informer, and whether the officers were justified in their belief; and secondly, the defendant was entitled to know the name of the informer, so that the defendant might impeach the testimony of the government witnesses.

4. In that the Court erred in its ruling, overruling the objection to the following evidence, to which ruling the defendant duly excepted:

"Q. What was the reason for your going out there in this vicinity?

A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception."

(Page 28, Narrative Bill of Exceptions.)

The overruling of the objection to the above evidence is assigned as error for the reason that this evidence is mere hearsay and based on information obtained and conversations had not in the presence of the defendant. The admission of this testimony was prejudicial error.

5. In that the Court erred in giving the following charge to the jury, to which charge the defendant duly excepted:

"WEST, *J.*: (Orally)

Members of the jury, the statute under which this indictment is drawn provides that no person shall transport or possess, buy or sell, any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal taxes imposed on such spirits. The provision of this section does not apply to distilled spirits not intended for sale or for use in the manufacture or production of any articles not intended for sale.

The indictment charges that on December 31st, 1935, in this jurisdiction, the defendant knowingly and unlawfully possessed, in a Dodge sedan, License LX-418, a quantity of distilled spirits, being about twenty-four quarts of gin and thirteen and one-fifth gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of spirits therein and evidencing payment of internal revenue taxes, in violation of the provisions of the section which I have just read to you.

Count 2 charges the defendant with the unlawful transportation in the same Dodge sedan of the same liquor in unstamped containers.

The defendant has pleaded not guilty and is presumed to be innocent of both of these offences. You will not be justified in finding him guilty unless the evidence satisfies you of his guilt beyond a reasonable doubt. Proof of guilt beyond any possible doubt is not required, but only proof beyond a reasonable doubt. That is, you must be satisfied, before you can find him guilty, that the evidence proves such guilt to a moral certainty. If the Government's proof does not convince your minds to this degree, or if the defendant's evidence raises a reasonable doubt of his guilt, then you shall acquit him.

No presumption arises against the man because this indictment has been returned and he has been tried upon it.

The defendant admits, and the evidence clearly shows, that on the night in question he did have in his possession, and did transport as charged, the liquor named in the indictment; and it appears that the bottles did not bear the stamps required by law.

The first question of fact for you to decide is whether the defendant knew before the officers searched this car that the ninety bottles in the car were unstamped. He says he did not. But, notwithstanding that, the other facts and circumstances disclosed may convince you that Scher is falsifying; that he did know and must have known that this was illegal liquor on which the tax had not been paid, and, consequently, that no tax stamps were on the bottles. You are to weigh his assertion that he did not know against other evidence and circumstances, if there are any, tending to prove that he must have known, and from all of the evidence are to determine where the truth lies.

Hyman Scher is of mature age, intelligence, and was in business with one of his brothers. In December, 1935, he testifies that an unknown man, whom he knew only as 'Joe,' I believe, came to the hat store and told him that good liquor was to be had at a certain address on Drexel Avenue, at a great bargain; and that when the defendant showed his interest in the matter, this unknown man went to the telephone, and as I remember, made a 'date' for the defendant to visit the party on Drexel Avenue. He says that he drove out that night and went to the place and interviewed a man named Carr, who told him he was selling out his business and could let him have seven cases of Canadian bonded liquor at a very low price, $22.50 a case, and he says that as he and his family were much given to generous entertainment, and were planning to hold a party for the next night, he thought well of this offer and so took a case as a sample, loaded it into his automobile, and drove to his home on Olivet Avenue to get his brother's opinion, and that there the whiskey was sampled and its purchase decided on.

At this point a matter appears which you should consider. The officers, or one of them, testified that when the Dodge car first appeared at the Drexel Avenue place, it was not driven in but was parked in the street. The driver entered the house and shortly emerged with a package like those later found in the car, but that there were a great many of these packages in the car,—some thirty, I believe they said. So that if this is true, and I believe Scher did not deny it, one package might not contain twelve bottles, for the whole number of bottles found in the

car was ninety, and a case is said to contain twelve bottles.

Again, the officers say, and it is not contradicted, that three women came from the house with Scher and drove away with him and returned with him when he returned. Now, the defendant says nothing about these three women, and it may seem strange to you that if he did, in fact, drive to see his brother, and take the liquor to him for inspection, neither he nor his brother have remembered, or at least have not given any account, of the three women; nor have any of the women been produced to contradict these witnesses,—to corroborate these witnesses. Of course, it is possible they may just have gone for the ride and remained in the machine while the defendant took the whiskey into the house on Olivet Avenue to exhibit it to his brother, who knew nothing of the women being outside in the cold. That would explain the brother's failure to mention that, but would not, as I see it, account for the failure of the defendant to either produce them and have them tell where he took them and so substantiate the story of the visit to the brother, or else explain why they are not produced.

The Government is not shown to know who these women were or to be able to produce them. The defendant and his counsel would hardly overlook a matter so vital to the defendant—I say 'vital,' because Scher and his brother both testified that it was when the defendant brought the sample case to their home on Olivet that the purchase of the seven cases for the New Year's party was decided, and it was there that the defendant secured funds to help pay the price of $145.00, and any evidence that such a visit was made would tend to corroborate that.

While the failure to produce corroborating testimony or account for its absence may well be thought by the jury to cast a grave doubt upon their story, the effect, of course, of these discrepancies, if you find they exist, is entirely for the jury to decide.

Now, getting back to the question whether Scher knew the bottles were not stamped: if you accept the testimony that he did take a case to his brother, then it appears that a bottle was opened by them and one or more drinks taken, and, although the tes-

timony shows that these stamps are applied to the cork, Scher insists he did not notice the absence of the stamps. Again, you should consider that the two trips to the Drexel Avenue house were made at night to get a bargain at a private home, and not a lawful liquor store. Now, under those circumstances, was it at all probable that the defendant expected this bargain price liquor to be lawful liquor on which the tax had been paid?

He said that Carr assured him it was Canadian bonded goods; but it seems to me evident that Scher did not understand from that that it would be tax paid, for he testified that to him 'Canadian bonded whiskey' meant simply whiskey of a good quality.

From all of the testimony bearing on the point, and giving effect to the reasonable inferences to be drawn from such facts as are either admitted or proven, what do you say? Did the defendant know and appreciate that the bottles were not stamped? If he did not, your verdict must be not guilty; but if he did, then you should consider the affirmative defense which the defendant also advances.

The statute involved here which prohibits possession or transportation does not apply to distilled spirits not intended for sale or for use in manufacturing or producing articles intended for sale, and it is the contention of the defendant and his counsel that the defendant bought this liquor not for sale but for the use of himself and his family and friends, and, consequently, that the statute has no application to him. This may be called an affirmative defense, and upon this issue the burden does not rest upon the Government, but the defendant has the burden of showing by the greater weight of the evidence that although the taxes had not been paid and the containers bore no stamps, yet the statute did not apply against him because he did not intend to sell the liquor or use it for making some article for sale.

The law is that when one is found transporting distilled liquors in unstamped containers, and, therefore, prima facie committing an offense, he would be required to explain why he shall not be regarded as a violator, and the burden of proof rests on him to make a satisfactory explanation by proof to a jury that the spirits were not intended to be sold or used to produce articles for sale. He is not required to prove this beyond a reasonable doubt, but he is re-

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Now, Scher testifies, and in this he is supported by several members of his family, that he had this liquor solely for their personal consumption and entertainment of their guests. The Government, in the nature of things, cannot produce direct evidence of the man's purpose and intention when he bought the liquor. As in most such cases, the Government relies on circumstantial evidence, which may properly be received and considered by the jury in this case. Among the circumstances to be considered are the time, place, and the nature of the place, and the method employed in securing the liquor.

Scher was using an automobile bought by him in his brother's name and licensed in the name of his brother. He has an explanation for that, which you will consider, giving it such weight as you think it is entitled to. He acted on information from a man said to be unknown to him. He drove to this private home in the night. He left with three women, and Scher returned, drove into the yard to get the load, but extinguished the lights on his car while it was being loaded, and bought seven and a half cases, or ninety bottles of liquor put out in unstamped bottles, marked and labeled s being very well known brands. Would a man, or th e men, in the situation of the Schers, be likely to spend $145.00 at one time for liquor for their friends and family, when they then had, according to the testimony, at least a case available for use in their house?

The Government does not claim that any one of these circumstances disproves Scher's assertion, but it does contend that when they are all taken together, they do refute it.

It is not contended that the defendant expected to sell this liquor at his home on Olivet; that a bootleg joint was conducted at this place. If the defendant, in other words, was to sell, it would make no difference when or where or to whom the proposed sales were to take place; and of course you all appreciate that bootleggers often times ply their trade in various ways without having any fixed location for the operation of their business.

You will also consider the testimony as to the habit of entertaining at the Olivet Street home. I need not repeat that evidence. Just how much truth

or probability there may be in it, in the testimony of the father and the others of the members of the family upon this point, is for you to say.

And as to all of the testimony the jury is the sole judge of its weight. So, too, you are to judge the credibility of the witnesses. In general, you may consider the appearance and demeanor of the witnesses; his frankness or lack of it; the reasonableness or unreasonableness of his story; and the interest he has in the outcome of the case; whether, because of relationship to the defendant, or otherwise; and from all of the testimony touching these matters, it is for the jury to say just what weight, if any, you will give to the evidence of any witness. But, more specifically, if you find that the defendant or any other witness has wilfully and knowingly testified falsely to a material matter, you may disregard all of his evidence. For example, if when the defendant testified that he did not know that the containers of the liquor were not stamped, he wilfully testified to what he knew to be false, you have the right to reject not only that evidence, but all of the rest of his testimony, as well.

I have followed the custom in Federal courts to briefly relate to the jury some of the more important testimony,—not to interfere with your function as triers of the fact, but only to help you to remember and apply that evidence, for you are the sole judges of facts and are not bound to follow any view of the Court as to them; and you should consider all of the evidence, not merely that of which I have spoken. And if your memory differs from mine, you are to take the testimony as you recall it.

You must not be influenced by any bias, prejudice or sympathy, either for or against the defendant. For example, he testified that he expects to be married soon. Whether that was intended to arouse your sympathy, I do not know, but at all events, the defendant's matrimonial plans and the probability of it being interfered with are not to be given any consideration or any weight whatever by this jury. It is not concerned with the result of the verdict or how it will affect the defendant, or anyone else.

The evidence has been received to show the defendant's good reputation. Such character evidence, so-called, is allowed on the theory that one

having a good reputation or being a law-abiding citizen is not so likely to commit a crime as one who does not enjoy such a reputation, but the weight of such evidence is entirely for the jury, and no reputation, however good, will excuse a crime, even a first offense.

You may find the defendant guilty or not guilty on both counts; or guilty of one and not guilty under the other. Although, I suppose, that if he is guilty of possession under the first count he must necessarily be guilty of transportation under the second. However that, as well as all other questions of fact, I now submit to you for your decision.

After retirement, you shall select one of your number foreman. When you have unanimously agreed upon a verdict, verdicts in the Federal Court must be rendered by unanimous agreement of all of the jurors, you will have the foreman,—and only the foreman,—sign the verdict upon which you have agreed, and return it into open court.

Is there anything further, gentlemen?

Mr. Scott: Nothing.

Mr. Doyle: Nothing.

The Court: You may retire and consider the case.

Mr. Doyle: Note a general exception to the Court's charge.

(Pages 51 to 57, both inclusive, Narrative Bill of Exceptions.)

The above charge given to the jury by the Court is assigned as error here for the reason that the Court by said charge invaded the province of the jury as triers of the facts, and that said charge as a whole was prejudicial and adverse to the interests of the defendant.

6. In that the Court erred in giving the following charge to the jury, to which the defendant duly excepted:

"'The statute involved here which prohibits possession or transportation does not apply to distilled spirits not intended for sale or for use in manufacturing or producing articles intended for sale, and it is the contention of the defendant and his counsel that the defendant bought this liquor not for sale but for the use of himself and his family and friends, and, consequently, that the statute has no

application to him. This may be called an affirmative defense, and upon this issue the burden does not rest upon the Government, but the defendant has the burden of showing by the greater weight of the evidence that although the taxes had not been paid and the containers bore no stamps, yet the statute did not apply against him because he did not intend to sell the liquor or use it for making some article for sale.

The law is that when one is found transporting distilled liquors in unstamped containers, and, therefore, prima facie committing an offense, he would be required to explain why he shall not be regarded as a violator, and the burden of proof rests on him to make a satisfactory explanation by proof to a jury that the spirits were not intended to be sold or used to produce articles for sale. He is not required to prove this beyond a reasonable doubt, but he is required to prove it by the fair preponderance of the testimony."

(Page 55, Narrative Bill of Exceptions.)

The giving of the above charge is assigned as error here for the reason that the Court placed an unfair burden of proof upon the defendant in that he charged the jury that the burden rested upon the defendant to show, by the greater weight of the evidence and by the fair preponderance of the testimony that the statute under which the defendant was charged did not apply to the defendant by reason of one of the exceptions set forth therein. The giving of said charge was prejudicial and adverse to the interests of the defendant.

7. In that the Court erred in giving the following charge to the jury, to which the defendant duly excepted:

"It is not contended that the defendant expected to sell this liquor at his home on Olivet; that a bootleg joint was conducted at this place. If the defendant, in other words, was to sell, it would make no difference when or where or to whom the proposed sales were to take place; and of course you all appreciate that bootleggers often times ply their trade in various ways without having any fixed location for the operation of their business."

(Page 56, Narrative Bill of Exceptions.)

The giving of the above quoted charge is assigned as error here for the reason that there was no testimony nor

any proof whatsoever that the defendant was a bootlegger, or engaged in the business of bootlegging, and therefore, the reference by the Court to "bootleggers" is prejudicial error.

8. In that the Court erred in giving the following charge to the jury, to which the defendant duly excepted:

> "And as to all of the testimony the jury is the sole judge of its weight. So, too, you are to judge the credibility of the witnesses. In general, you may consider the appearance and demeanor of the witnesses; his frankness or lack of it; the reasonableness or unreasonableness of his story; and the interest he has in the outcome of the case; whether, because of relationship to the defendant, or otherwise, and from all of the testimony touching these matters, it is for the jury to say just what weight, if any, you will give to the evidence of any witness. But, more specifically, if you find that the defendant or any other witness has wilfully and knowingly testified falsely to a material matter, you may disregard all of his evidence. For example, if when the defendant testified that he did not know that the containers of the liquor were not stamped, he wilfully testified to what he knew to be false, you have the right to reject not only that evidence, but all of the rest of his testimony, as well."

(Page 56, Narrative Bill of Exceptions.)

The giving of the above charge is assigned as error here for the reason that the Court failed to charge the jury that, though a witness may have testified falsely in one part, the jury, in addition to having the right to reject all of his testimony had also the right to reject any part of his testimony and retain the other as true. Failure so to charge the jury was prejudicial error.

9. In that the Court erred in overruling defendant's motion for a new trial and in refusing to grant a new trial on the ground that the verdict of the jury was against the weight of the evidence since the defendant had shown by the weight of the evidence that the liquor found in his possession was not intended for sale or for use in the manufacture of articles intended for sale.

10. In that the Court erred in overruling defendant's motion for a new trial and in refusing to grant a new trial upon the grounds therein stated, all of which are fully enumerated and assigned in the foregoing assignment of errors, to which reference is hereby made.

WHEREFORE, said defendant prays for a reversal of said judgment and sentence made and entered in said District Court in the within case.

GERALD A. DOYLE,
*Attorney for Defendant,*
521 Guarantee Title Building,
Cherry 4953.

Service of a copy of the foregoing Assignment of Errors is acknowledged this 5th day of June, A. D. 1936.

ROY C. SCOTT,
*Asst. United States District Attorney.*

## PRECIPE FOR TRANSCRIPT.

(Filed May 27, 1937.)

*To the Clerk:*

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause and include therein the following papers and orders:

1. Indictment.
2. Motion to Suppress Evidence.
3. Order over-ruling Motion to Suppress Evidence.
4. Plea of Not Guilty.
5. Jury Sworn and Orders on Trial.
6. Motion for New Trial.
7. Memorandum of Court Over-ruling Motion to Suppress the Evidence.
8. Order over-ruling Motion for New Trial and Judgment.
9. Notice of Appeal.
10. Order Fixing Bail Bond.
11. Bail Bond.
12. Order Fixing Time for Preparation of Record.
13. Order Directing Appellant to Lodge Bill of Exceptions.
14. Bill of Exceptions and Exhibits.
15. Order on Bill of Exceptions.
16. Assignment of Errors.
17. Precipe.
18. Clerk's Certificate.

GERALD A. DOYLE,
*Attorney for Defendant,*
521 Guarantee Title Bldg.,
Ch. 4953.

Copy of within received this 27 day of May 1937.

E. B. FREED,
*U. S. Attorney,*

By ROY C. SCOTT,
*Asst. U. S. Atty.*

## CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO, ss:

I, C. B. WATKINS, Clerk of the United States District Court, within and for said district, do hereby certify that the foregoing typewritten pages contain a full, true and complete copy of the record and all proceedings and pleadings in this cause in accordance with the praecipe for transcript filed herein, the originals of which papers remain in my custody as Clerk of said Court.

There are also transmitted and certified herewith the original bill of exceptions and the assignment of errors, all in accordance with Rule IX of the Supreme Court of the United States with reference to the practice and procedure with respect to proceedings in criminal cases after verdict.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district this 9th day of June, A. D. 1937 and in the one hundred and sixty-first year of the Independence of the United States of America.

C. B. WATKINS, *Clerk*,
By K. V. WILSON,
*Chief Deputy.*

(Seal)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—November 11, 1937

(Before Moorman, Allen and Nevin, JJ.)

This cause is argued by Gerald A. Doyle for Appellant and by Roy C. Scott for Appellee and is submitted to the Court.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered February 18, 1938

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

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[File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

HYMAN SCHER, Alias WILLIAM SCHER, Appellant,

v.

THE UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division

OPINION—Filed February 18, 1938

Before Moorman and Allen, Circuit Judges, and Nevin, District Judge

Per CURIAM:

The appellant was found guilty under two counts of an indictment charging him with unlawful possession and

transportation of distilled spirits, the containers of which did not have revenue stamps affixed thereto. The offenses charged were violations of Section 1152a, Title 26, U. S. C.

Investigators of the Alcohol Tax Unit at Cleveland, Ohio, received confidential information from a source previously proved to be reliable that a load of tax-unpaid distilled spirits in bottles would be taken from a given address in a certain car, the make, model, and license number of which were given, at about midnight of December 30, 1935. The investigators saw appellant call at the designated address in a car of the specified make, model, and license number, at about nine P. M., and leave about ten-thirty, carrying a package and accompanied by three women. The car returned about midnight. It was parked without lights in the driveway at the rear corner of the house for about half an hour. From the opposite side of the street the investigators heard the rear door of the house open, and several times heard the sound of heavy paper being scraped across a hard surface, after which they heard two doors slam. Appellant then drove the car, which appeared to be heavily loaded, to his residence. He drove into the garage, and was in the act of getting out of the car when one of the investigators approached with a flashlight, and asked if the car was hauling bootleg whiskey. Appellant said it was for a party, and in reply to the question as to whether it was tax paid, said that it was "Canadian whiskey," and that it was in the trunk of the car. In the car eighty-eight bottles without tax stamps were found in fourteen packages similar to that which appellant had previously carried from the premises under observation.

Appellant's principal contentions are (1) that the court erred in denying appellant the right to cross-examine as to the identity of the informant, and (2) in overruling appellant's motion to suppress the evidence.

As to the first contention, for reasons of public policy the identity of a confidential informant must be kept secret, and such sources need not be disclosed. Segurola v. United States, 16 Fed (2d) 563 (C. C. A. 1); Vogel, Extr., v. Gruaz, 110 U. S. 311; Shore v. United States, 49 Fed. (2d) 519 (C. A. D. C.); McInes v. United States, 62 Fed. (2d) 180 (C. C. A. 9); Wilson v. United States, 65 Fed. (2d) 621 (C. C. A. 3); Goetz v. United States, 39 Fed. (2d) 903 (C. C. A. 5).

As to the second contention, appellant moved to suppress evidence obtained as a result of the search, on the ground that the search was without a warrant or without probable cause, and in violation of Section 14, Article I, of the Constitution of Ohio, and the Fourth and Fifth Amendments to the Constitution of the United States. The District Court overruled this motion, and its action was correct. The garage was not searched. Appellant did not oppose the search of the car. The circumstances presented facts within the personal knowledge of the agents, sufficient to lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile. There was no unlawful search and seizure. Husty v. United States, 282 U. S. 694; Carroll v. United States, 267 U. S. 132, 149; Wisniewski v. United States, 47 Fed. (2d) 825 (C. C. A. 6); Ferracane v. United States, 47 Fed. (2d) 677 (C. C. A. 7); United States v. Kind, 87 Fed. (2d) 315 (C. C. A. 2) is distinguishable upon the facts.

The judgment is affirmed.[1]

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Petition for rehearing, covering 10 pages, filed March 18, 1938, omitted from this print. It was denied, and nothing more by order dated April 13, 1938.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Filed April 13, 1938

The petition for rehearing of this cause is hereby denied.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AMENDING OPINION—Filed April 13, 1938

It is ordered that the opinion in the above case be amended by striking out of the next to last paragraph

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[1] Judge Moorman took no part in the decision of this case.

thereof the following sentence: "Appellant did not oppose the search of the car."

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Clerk's certificate to foregoing transcript omitted in printing.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 31, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

[redacted]

In the Supreme Court of the United States

[redacted]

No. [redacted] 19

[redacted], alias WILLIAM SCHEER,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF IN SUPPORT THEREOF.

A. L. [redacted],
N. B. C. Building, Cleveland, Ohio,
*Attorney for Petitioner.*

[redacted] A. Doyle,
*Of Counsel,*
N. B. C. Building,
Cleveland, Ohio.

The Gong Legal Publishing Co., Cleveland, Ohio

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## Authorities Cited.

**Statutes and Constitutional Provisions Involved.**

# In the Supreme Court of the United States

**OCTOBER TERM, 1938.**

## No. .....

HYMAN SCHER, alias WILLIAM SCHER,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

## NOTICE.

To EMERICH B. FREED, *United States District Attorney for the Northern District of Ohio, Eastern Division, attorney for Respondent:*

Please take notice that on the ..... day of ....., 1938, at the opening of Court on that day or as soon thereafter as counsel can be heard, a petition for Writ of Certiorari, of which a copy is annexed hereto, will be submitted to the Supreme Court of the United States at the City of Washington, District of Columbia, for the decision of the Court thereon. In support of said motion and petition, a brief will also be presented to said Court, copies of which are herewith served upon you.

A. L. GREENSPUN,
*Attorney for Petitioner.*

GERALD A. DOYLE,
*Of Counsel.*

Service of the foregoing notice, together with copy of Petition and Brief of Petitioner, is hereby admitted this 11th day of May, 1938.

EMERICH B. FREED,

*Attorney for Respondent.*

# In the Supreme Court of the United States

**OCTOBER TERM, 1938.**

## No. .....

HYMAN SCHER, alias WILLIAM SCHER,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
**To the United States Circuit Court of Appeals For the Sixth Circuit.**

*To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

### GENERAL STATEMENT.

(All emphasis in this petition and brief are ours unless otherwise designated.)

Petitioner, Hyman Scher, was indicted in the United States District Court for the Northern District of Ohio on May 31, 1936 for alleged violation of Section 1152A, title 26, U. S. C. A. which creates and defines offenses against the Internal Revenue Laws of the United States.

Said indictment contained two counts, one for the unlawful possession of a quantity of distilled spirits, the immediate containers not having affixed thereto stamps de-

noting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue tax.

The second count alleged that the petitioner did unlawfully transport, in a Dodge de luxe sedan automobile, a quantity of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue tax imposed thereon.

The petitioner filed a motion to suppress the evidence obtained by the search made by the Internal Revenue agents on the ground that such search was not based upon probable or reasonable cause and was in violation of the petitioner's rights under the State and Federal Constitution. This motion was overruled by the District Court on May 5, 1937 and an opinion is filed by Honorable Samuel H. West, Judge of the District Court of the United States, trial Judge. (Record 7 and Record 11.)

The case then proceeded to trial and the petitioner was found guilty under both counts. The verdict was returned on May 7, 1937. (Record 10 and 11.)

Petitioner's motion for a new trial was overruled (Record 12 and 13) and the Court sentenced the petitioner to imprisonment in the United States Reformatory at Chillicothe, Ohio, for a period of one year and one day, and the Court further imposed a fine of Three Hundred Dollars ($300.00) and costs.

A notice of appeal was then filed by the petitioner (Record 13) and the principal errors relied upon by the petitioner in the Circuit Court of Appeals for the Sixth Circuit was the action of the trial Court in overruling the motion to suppress the evidence, and its ruling on objections to questions relating to confidential informants. The Court of Appeals, on February 18, 1938 affirmed the judgment of the trial Court.

Subsequently a petition for rehearing was filed in the United States Circuit Court of Appeals for the Sixth Circuit and on April 13, 1938 the petition for rehearing was denied by said Court.

## II.

## STATEMENT OF FACTS.

### A. Facts as to motion to suppress evidence.

The petitioner, Hyman Scher, resides with his parents at 10025 Olivet Avenue, Cleveland, Ohio, in a two family house with a double garage in the rear of the premises, located about six feet to the rear of the house and within the curtilage of the home, and had so resided for the past fourteen years. (Record 19.) The home was situated in a strictly residential district and no business was carried on in the premises or in the vicinity.

The defendant was never charged with trafficking in liquor and had never been arrested or convicted on any criminal charge whatsoever.

On December 31, 1935, the Revenue Officers received information from a source which the Revenue Officers had heretofore found to be reliable to the effect that "phoney" whiskey was being sold from certain premises at 10838 Drexel Avenue, Cleveland, Ohio, and that at midnight or shortly thereafter a load of this whiskey would be taken from those premises in a Dodge car, license LX 418.

The Revenue Agents observed those premises from 8 o'clock P. M. on that day. At about midnight the said Dodge automobile drove up toward the garage of the premises at 10838 Drexel Avenue. The lights of the car were out and the car remained in said driveway for about one-half hour. One of the officers heard something heavy set down like wood, and heard it slide, like it was heavy paper, across a wooden surface, heard the door slam, the trunk slam and the door of the car slam. The car then was driven

out of the driveway and the Revenue Agents followed it to a gasoline station several blocks away where the car stopped. The man later identified as the petitioner alighted, the gasoline station attendant put gasoline in the tank and the petitioner walked across the street and returned with a newspaper in his hand.

The car then was driven about two or three blocks to Olivet Avenue where the petitioner drove his car slowly to a stop and then turned into the driveway of his home located at 10025 Olivet Avenue, Cleveland, Ohio.

The petitioner drove said automobile into his garage, turned off the lights and was in the act of getting out of the car when one of the investigators, with a flash light in his hand, approached the petitioner and asked the petitioner if he was hauling bootleg liquor. In response to a question by the investigator if he was hauling bootleg whiskey, petitioner replied "Just a little for a party."

In a reply to a question of the officers as to whether it was tax paid, the petitioner replied "It is Canadian whiskey," and in response to the investigator's question said it was in the trunk of the car. The Revenue Agents then forced open the trunk and found therein eighty-eight bottles without tax stamps on the bottles or cases. The petitioner was then arrested and the automobile and bottles confiscated. (Record 24-27.) *The search was admitted to have been made without a search warrant.*

**B. Facts as to confidential informer.**

Upon the trial of this cause in the District Court, certain questions relating to the identity of the informer and the source of the information, obtained by the Revenue Agents and which the Revenue Agents considered reliable were objected to by counsel for the Government and the objections sustained by the Trial Court to which the petitioner excepted. Counsel for petitioner inquired of the

Revenue Agents whether or not said Revenue Agents had received confidential information concerning the petitioner which he had considered reliable and which later turned out to be unreliable, false and perjurious. (Record 29.) Further the Court sustained objections over the exception of the petitioner as to a question as to the identity of the confidential informer.

Counsel for petitioner made a proffer to show by this line of cross examination petitioner would show that the Revenue Agent had received information which he considered reliable at a former trial of the petitioner, which testimony, after an investigation by the Attorney General of the United States proved to be false, perjurious and unreliable. (Record 34 and 35.)

The Court overruled an objection to the answer of the Revenue Agent that he had received reliable information from a confidential informer as to a certain Dodge automobile, to which petitioner duly excepted. (Record 28.)

The Court refused to permit counsel for petitioner at any time to cross examine or inquire from the Revenue Agent as to the identity of the alleged confidential informer and the source of the confidential information and the reliability thereof.

## III.

## ASSIGNMENT OF ERROR IN THE COURT OF APPEALS.

Exceptions were duly taken to the trial Court's action in overruling the motion to suppress the evidence, in overruling petitioner's motion for a new trial, and also as to the rulings of the Court upon the questions relating to the confidential informer relied upon by the Revenue Agents to justify their search of the petitioner's home.

The substance of the errors principally relied upon in the Court of Appeals, briefly stated, is as follows:

1. The Court erred in overruling petitioner's motion to suppress evidence on the ground that the search was unlawful and not based upon probable cause, and was in violation of the petitioner's right under the State and Federal Constitutions.

2. The Court erred in refusing to permit petitioner to examine witnesses as to the identity and reliability of the confidential informer and as to the reliability of the information furnished the Revenue Agents.

3. That the Court erred in overruling the petitioner's motion for a new trial based upon the assignments of error hereinabove set forth.

## IV.

## ACTION OF THE COURT OF APPEALS AND HOLDINGS BELIEVED TO BE ERRONEOUS.

The Court of Appeals affirmed the judgment of the Court below and after making a statement of facts, as appears in the opinion, and which is attached hereto and marked Appendix A, stated the following conclusions of law:

1. The Court found that there was no unlawful search and seizure and that the circumstance presented facts within the personal knowledge of the agents sufficient to lead a reasonably discreet and prudent man to believe that liquor was unlawfully possessed in the automobile.

It is respectfully submitted that the record contains no evidence to show that there was probable cause to believe that *tax unpaid* liquor was possessed or being transported by the petitioner and that there was therefore, no probable cause for the search without a warrant, and therefore that the search and the seizure was in violation of Section 14, Article 1 of the Constitution of Ohio and the 4th and 5th Amendments to the Constitution of the United States.

2. The Court further held that "the garage was not searched."

It is respectfully submitted that the record clearly shows that the garage of the petitioner was located within the curtilage of the petitioner's home and residence; that the automobile at the time of the search was at rest and in said garage.

It is respectfully submitted that the Court erred in holding that the garage was not searched.

3. The Court found that for reasons of public policy the identity of a confidential informer must be kept secret and such source need not be disclosed.

It is respectfully submitted that this ruling of the Court is erroneous in that the petitioner was thus precluded from cross examining the witness so that the Court, and not the Revenue Agents themselves, might determine whether or not the information received by the Revenue Agents was reliable information, or whether it was pure speculation and hearsay.

## V.

## REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI.

Petitioner respectfully shows to the Honorable Court that a Writ of Certiorari should be issued directing the removal of the cause to this Court, because:

1. The holding of the Court of Appeals that there was reasonable and probable cause to believe that *tax unpaid* liquor was being transported by the petitioner, and that there was no unlawful search and seizure, is in conflict with the holdings in the following cases: *U. S. v. Kind,* 87 Fed. (2) 315 (C. C. A. 2); *Brown vs. U. S.,* 4 Fed. (2) 247; *Emite vs. U. S.,* 15 Fed. (2) 623; *U. S. v. DiCorvo,* 37 Fed. (2) 124; and the Court of Appeals also thereby decided an important question of general law in a way probably un-

tenable and in conflict with the great weight of the authorities upon the subject.

2. The holding of the Court of Appeals under the evidence that the petitioner's garage was not searched is in conflict with the following cases: *U. S. v. Kind,* 87 Fed. (2) 315 (C. C. A. 2); *U. S. v. Slusser,* 270 Fed. 818; *Temperani v. U. S.,* 299 Fed. 365; *Wakkuri v. U. S.,* 67 Fed. (2) 844 (C. C. A. 6); *U. S. v. Raho,* 10 Fed. Sup. 660; and is also in conflict with the holding of this Court in the case of *Taylor vs. U. S.,* 286 U. S. 1, 76 L. Ed. 951; and the Court of Appeals also thereby decided an important question of general law in a way probably untenable and in conflict with the great weight, if not all, of the authorities upon the subject. The holding of the Court of Appeals that the identity of a confidential informant must be kept secret and such source need not be disclosed, and that examination as to the reliability of the information cannot be made is a decision to an important question of general law in a way probably untenable. This question has never been decided by the Supreme Court of the United States and aid question is of great general and public interest, not only to the petitioner but to the Government as well.

Your petitioner presents herewith specifications of errors and brief showing more fully his views upon the questions of law involved in the transcript of the record in the United States Circuit Court of Appeals.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case number and style on its docket, "Hyman Scher, alias William Scher, appellant, vs. The United States of America,

appellee, Number 7773," to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution of the United States and the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

This 9th day of May, 1938.

HYMAN SCHER,
*Petitioner.*

A. L. GREENSPUN,
*Attorney for Petitioner.*

GERALD A. DOYLE,
*Of Counsel.*

# In the Supreme Court of the United States

**OCTOBER TERM, 1938.**

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## No. .....

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HYMAN SCHER, alias WILLIAM SCHER,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### OPINION OF THE COURT.

1. The opinion in the United States Circuit Court of Appeals for the Sixth Circuit was handed down on February 18, 1938 and is reported in 95 Fed. (2) 64. A copy of this opinion is attached hereto and marked "Appendix A."

2. Subsequently a petition for rehearing was filed by the petitioner which was denied on April 13, 1938. On that same date, to-wit: April 13, 1938, the Court of Appeals made an order amending its opinion by striking out next to the last paragraph thereof, the following sentence, "Appellant did not oppose the search of the car." A copy of said order is attached hereto and marked "Appendix B."

## II.

## JURISDICTION.

1. The date of the judgment to be reviewed is February 18, 1938. Thereafter, a petition for rehearing was filed and was denied on April 13, 1938.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Article 240 of the Judicial Code as amended appearing in Title 28, U. S. C. A. Section 347. The United States District Court for the Northern District of Ohio alleged violation of Section 1152A, Title 26 U. S. C. A. (Record 2.) A motion to suppress the evidence was overruled by the trial Court. (Record 11.) The Jury then found the petitioner guilty (Record 11) and the Court sentenced him to imprisonment in the United States Reformatory at Chillicothe, Ohio.

Thereafter, petitioner by appropriate proceedings, appealed to the Circuit Court of Appeals, for the Sixth Circuit, which Court affirmed the judgment of the lower Court and denied a petition for rehearing filed by petitioner.

## III.

## STATEMENT OF CASE.

The statement of the case has already been made in the petition, Sections I and II (pages 3 to 7) which statements we hereby attach and make part of this brief.

## IV.

## SPECIFICATIONS OF ERRORS.

The judgment of the Court of Appeals and the Trial Court should be reversed and the cause remanded for a rehearing upon the following grounds:

1. The Trial Court should have sustained the petitioner's motion to suppress the evidence, and the Court of

Appeals erred in failing to reverse and remand the cause because of its failure to do so, for the following reasons:

(a) That there was no reasonable or probable cause such as would lead a reasonably discreet and prudent man to believe that *tax unpaid* liquor was possessed and being transported by the petitioner.

(b) That there was an unlawful search of the petitioner's premises and an unlawful seizure in violation of the petitioner's rights under the United States and Ohio Constitutions.

(c) That the garage in which the automobile was located, and where the search was made, was within the curtilage of the petitioner's home and, therefore, within the protection of the Constitutional guarantees against unreasonable search and seizure.

2. In that the Trial Court should have permitted petitioner to cross examine and examine witnesses as to the identity of the confidential informer and the source of the information so that the Court might determine whether or not the witness had reasonable cause to believe this informant and whether the information was reliable; secondly, petitioner was entitled to know the identity of the informer so that he might, if possible, impeach the testimony of the Government witnesses.

The Court of Appeals erred in failing to reverse and remand the cause because of error of the Trial Court in refusing to permit said examination as aforesaid.

3. The Trial Court erred in overruling petitioner's motion for a new trial, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so for the reasons first above stated.

## V.

## ARGUMENT.

(In this brief and argument, petitioner will be designated as defendant.)

### A. MOTION TO SUPPRESS EVIDENCE.

#### 1. The Search of the Premises Was in Violation of Defendant's Rights.

Under and by virtue of the terms of the Fourth Amendment of the Constitution of the United States, the defendant had a right to have his private dwelling and, therefore, his garage, exempt from unreasonable search and seizure.

In the case of *Grau vs. United States*, decided November 7th, 1932, 53 S. Ct. Rep., page 38, the affidavit for the search warrant states that the affiant went around and about the premises therein described and saw persons hauling cans, commonly used in hauling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he said there was a still and whiskey mash on the premises. We quote from the opinion on page 40 as follows:

> "The affidavit fails to state the place to be searched is not a private dwelling, and the record affirmatively shows it was. At most the deposition charges the manufacture of whiskey; no averment of sale is made: indeed no facts are given from which sale, on or off the premises described, necessarily is to be inferred. The Court below, however, held that the facts set forth warranted a belief that the dwelling was being used as headquarters for the merchandising of liquor. This was deemed a sufficient compliance with the statutory

permission for search of a dwelling if 'used for the unlawful sale of intoxicating liquor.'

"(2, 3) The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. *Boyd vs. United States,* 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; *Gouled vs. United States,* 255 U. S. 298, 304, 41 S. Ct. 261, 65 L. Ed. 647; *Go-Bart Co. vs. United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374. Congress intended, in adopting section 25 of title 2 of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose.

"(4, 6) A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles vs. United States* (C. C. A.) 284 F. 208; *Wagner vs. United States* (C. C. A.) 8 F. (2nd) 581), and would lead a man of prudence and caution to believe that the offense has been committed (*Steele vs. United States,* 267 U. S. 498, 504, 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made.

"The process should have been quashed, and the articles seized delivered to the petitioner. Their admission as evidence was error, and the judgment must be reversed.

"Reversed."

"Mr. Justice Stone and Mr. Justice Cardozo are of the opinion that the judgment should be affirmed."

We quote from *Angello vs. U. S.*, 269 U. S. 20; 51 A. L. R. 413:

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. *Boyd vs. United States,* 116 U. S. 616, 624 *et seq.* 630, 29 L. Ed. 746, 748, 751, 6 Sup. Ct. Rep. 524; *Weeks vs. United States, supra,* 393 (58 L. Ed. 655, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177); *Silverthorne Lumber Co. vs. United States, supra,* 391 (64 L. Ed. 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182); *Gouled vs. United States,* 255 U. S. 298, 308, 65 L. Ed. 647, 652, 41 Sup. Ct. Rep. 261. The protection of the 4th Amendment extends to all equally;—to those justly suspected or accused as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose."

Not only is the search illegal because the Federal officers made their way into part of a private dwelling without a warrant, but also because they were trespassers within the curtilage of the defendant's home when they discovered evidence of the crime.

The constitutional prohibition against unreasonable searches and seizures is construed liberally to safeguard the rights of privacy. *U. S. vs. Lefkowitz,* 285 U. S. 452, 52 S. Ct. 420; *Go-Bart Importing Co. vs. U. S.,* 282 U. S. 344, 51 S. Ct. 153; *Taylor vs. U. S.,* 286 U. S. 1, 52 S. Ct. 466; *Sgro vs. U. S.,* 53 S. Ct. 138.

In the case of *U. S. vs. Slusser,* 270 Fed., 818, the officers entered upon the private premises and searched *an automobile which was in the garage. That search was held illegal.*

In the case of *United States vs. DiCorvo,* 37 F. (2d) 124, the court held that an officer had no right to enter the

*private drive way* of a farm house for the purpose of discovering intoxicating liquor.

In the case of *Elrod vs. Moss*, 278 Fed. 124, the court held that an officer must have personal and direct knowledge through his hearing, sight or other senses of the commission of the crime of which the defendant is accused.

It is clearly the law that a search of private premises, unreasonable and not based on probable cause at the time it was made, is not made lawful by what is found after the search is made, and that a seizure on mere suspicion is not justified by the confirmation of that suspicion. See *Gauske vs. United States*, 1 F. (2d) 620; *U. S. vs. Olmstead*, 7 F. (2d) 760; *U. S. vs. Spallino*, 21 F. (2d) 567.

In the case of *Wakkuri vs. U. S.*, 67 F. (2d) 844, decided by the Circuit Court of Appeals for the 6th Circuit on December 11, 1933, the officers had observed smoke coming out of a chimney in a bath house, located about 80 feet from the defendant's main dwelling house. The officers, also, had received complaints that the liquor law was being violated. On the morning before the search was made, two of the officers had concealed themselves near the bath house and could smell odors of cooking mash. They saw puffs of steam coming out of a vent in the building and saw spent grain near by. The officers had no warrant of any kind. The officers then entered upon the premises of the defendant, knocked upon the door of the bath house and when the door was opened by the defendant, saw the defendant standing beside a still about 3 feet from the door, saw whiskey running into a 12 gallon container, and saw barrels, kegs and jugs in the bath house. The officers then placed the defendant under arrest, entered the building, and seized some of the whiskey and paraphernalia for evidence. The court held that the search of the bath house was illegal and a violation of the defendant's constitutional rights. The syllabus of said case reads as follows:

"1. Bath house adjacent to dwelling house on small farm held within curtilage of home and within protection of the Constitution against unreasonable searches and seizures.

3. Any search of private dwelling without a search warrant is at least prima-facie unlawful.

4. That which might not be done with invalid search warrant, the only kind which could have been obtained, could not be permitted without any warrant.

5. Search of premises without warrant held not justified on grounds defendant was found in dwelling in commission of crime, where at that time officers had no knowledge of facts which had justified arrest and supported conviction."

The court held that the evidence as submitted by the officers would have been insufficient to obtain a search warrant; and, therefore, the search was unlawful and the motion to suppress should have been granted. The court, on page 845 of the *Wakkuri* case, says:

"Just as the validity of a search may not be judged by what it brings to light, so the right to search must be decided by the situation as disclosed before the search is made."

In the following cases where automobiles were searched on the road, the court held the search illegal by reason of the fact that the officers did not have probable cause to search the automobile without a warrant.

In the case of *U. S. vs. Allen,* 61 Fed. (2nd), 320, the agents had information that an automobile was going to haul liquor. One of the automobiles was to be a Studebaker with blue headlights, a driving light in the center and in which the rear glass of the right hand door had been broken and mended with tape. The agents watched the road, and saw such a Studebaker driving down the road. The automobile appeared to be heavily loaded and there was mud on the back of the car. The court held that the

motion to suppress, based on search without warrant, should be sustained on the ground that there were no facts such as to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported.

In the case of *Emite vs. U. S.*, 15 Fed. (2nd) 623, the officers were informed that cars parked at a certain ice plant hauled bootleg liquor from that plant. The officers had seen the defendant's car parked by the side of the ice plant and had seen it leave the plant. The car appeared to be heavily loaded and weighed down on the springs, and the officers in following the car noticed that the car went over bumps very carefully. The officers stopped the car on the road without a warrant and found liquor in the car. The court held that under these facts, there was no probable cause that the defendant was unlawfully in possession of and transporting liquor, and the evidence should have been excluded.

In the case of *Brown vs. U. S.*, 4 Fed. (2nd) 247, the officer saw the plaintiff park his car at the curb, remove some baggage from the back part of the car and start up the street. The package that the plaintiff carried was not smooth and from its appearance might contain bootleg whiskey. The officer arrested the plaintiff. Prior to that the officer had been informed that the plaintiff was a bootlegger and the license of the car was furnished, but the source of the information was not disclosed. The officer testified that he had seen the plaintiff deliver two packages before that time but testified that he did not know for certain what the packages contained. The court held that the officer was acting merely on suspicion and held the search illegal.

In the case of *U. S. vs. Alspach*, 12 Fed. Supp., 293, two agents had information that the defendant was delivering tax unpaid liquor. The agents saw the defendant

come out of the house, place a black oil cloth bag in the back end of his coupe and close the lid. The agents testified that from the appearance of the bag it contained a bottle or a jug, and that they could see glass through a worn part of the bag. The defendant drove his automobile into an alley. The agents followed, searched the back end of the car and found liquor. They had no warrant. The court held that the search was illegal. The syllabus reads as follows:

> "1. Information that defendant was delivering tax unpaid liquor and sight of defendant coming out of house and placing in automobile black bag through worn part of which officers could see glass, *held not to show probable cause that tax unpaid liquor was being transported* or concealed nor to justify arrest of defendant without warrant and seizure of automobile and liquor found therein.
>
> 2. To make arrests, searches and seizures without warrant, there must be probable cause of transportation or possession of liquor on which tax is unpaid."

The court in its opinion, on page 294, says:

> "It must be remembered that, to make arrests, search and seizures without warrants since the repeal of the 18th Amendment, there must be probable cause not only of the transportation or possession of liquor, *but of liquor on which the tax is paid*, since it is not unlawful to transport or possess tax paid liquor. The cases decided during the prohibition era, and which are cited by the government, must therefore be viewed in this light."

In the case of *United States vs. Kind*, 87 Fed. (2nd) 315, the indictment charged the defendant with unlawfully possessing liquor without tax stamps, under Section 1152A, United States Code. The facts adduced showed that on April 18, 1936, agents of the Government went to a garage which was rented by the defendant Kind, looked through

the window and saw a number of five-gallon cans wrapped in paper and three-gallon cans "usually used in transporting Belgian alcohol." The doors were locked and therefore an agent remained at the premises until the next morning when the appellant drove up in an automobile and opened the garage. The agent then testified that he detected the odor of liquor. The agents thereupon *entered the garage,* announced that they were Federal officers, arrested the defendant, *searched his car* and found in the car two bottles of liquor not containing stamps. The cans and the bottles were both seized.

The agents also testified that an investigator in the district had advised them that the particular automobile searched had been used in transporting alcohol, both Belgian and domestic, and that the defendant had been seen making deliveries of alcohol to various stores. The agents at no time had a search warrant. The lower court overruled a motion to suppress the evidence, and this judgment was reversed by the Circuit Court of Appeals, which held that the motion to suppress should have been granted.

The syllabus of that case reads as follows:

"1. *Searches and seizures*

Search of garage and seizure of alcohol in unstamped containers without warrant *after seeing accused drive automobile into garage* held unlawful where federal agents acted upon mere tip from unknown source, and because of smell of alcohol on outside of garage, and had opportunity to obtain warrant. (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)

"2. *Criminal law*

Alcohol in unstamped containers seized in garage leased by accused, in an unlawful search and seizure, held improperly received in evidence, in prosecution for possessing alcohol in unstamped containers. (Liq-

uor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)

"3. *Searches and seizures*

Search of garage and seizure of alcohol in unstamped containers found therein without warrant after receiving tip from unknown source, and noticing alcohol odor on outside of garage, and seeing accused drive automobile into garage could not be justified as incident of lawful arrest, since there *was no probable cause to believe that crime of possessing alcohol in unstamped containers was being committed in presence of officers.* (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)"

The Court in its opinion says:

"Nor can the search be justified as an incident of a lawful arrest. See *Agnello v. U. S., supra; U. S. v. Lee, supra.* The entry of the garage having been made without a search warrant and without probable cause, 'the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict' the appellant. *Taylor v. U. S., supra,* 286 U. S. 1, at page 5, 52 S. Ct. 466, 467, 76 L. Ed. 951. The smell of alcohol alone did not strip the tenant of the garage of his constitutional guarantee against unreasonable search. In the absence of probable cause to believe that the crime—*that of possessing alcohol in unstamped containers*—was being committed in the presence of the officers, there was no basis for a lawful arrest, and consequently no right of search and seizure.

"Judgment reversed."

In the case at bar, the officers had far less justification for the search and seizure made. The agents in the case at bar did not know that the defendant had liquor in his possession *without tax stamps,* did not see defendant make deliveries, nor did they smell alcohol. The entire search was based on the alleged tip. The agents acting on this

alleged tip, thereupon proceeded with the search and seizure of the garage at the defendant's home,—this in direct violation of the defendant's constitutional rights.

During the prohibition era, the courts uniformly held, as may be seen from the cases cited herein, that a search warrant could not be issued nor a search without warrant be made of a private dwelling unless based on such facts that would lead a man of reasonable prudence and caution to believe an offense had been committed. That was the rule during the period when the mere possession of any kind of intoxicating liquor was unlawful.

Now, under the Internal Revenue Laws, the possession of liquor in itself is not unlawful—it is unlawful to possess or transport "*tax unpaid liquor*," and then only, provided that the liquor is intended for sale or for the use in the manufacture of articles intended for sale.

It is, therefore, our contention that to constitute probable cause warranting the search of a private dwelling without a warrant, the facts upon which the search is based must be such as to impart to the agent a reasonable belief, such as a reasonably prudent and cautious man would believe, that *tax unpaid liquor* was in the possession of and was being transported by the accused and that said *tax unpaid liquor* was intended for sale or for the manufacture of articles intended for sale. *The mere possession of liquor is no longer an offense.*

In the case at bar, the facts upon which the search without warrant of the defendant's garage, a private dwelling, was based, are testified to by the Government agent, Sidney M. Bowes (Record, 24), in the hearing on the motion to suppress the evidence. The information upon which the Government agents relied was that a certain Dodge automobile would transport "phoney whiskey" from a certain address at a certain time. There was no information which would lead a reasonably cautious and prudent man

to believe that the so-called "phoney whiskey" was tax unpaid liquor, nor that it was intended for sale or for the use in the manufacture of articles intended for sale.

It is highly conceivable and highly probable that "phoney whiskey" might still have tax stamps thereon. To say that the use of the phrase "phoney whiskey" would impart such information to an agent and give him probable cause so as to authorize him to violate the sanctity of a man's private dwelling without even a search warrant would be to go farther and to stretch beyond recognition the principles laid down by our Constitution to protect the privacy of a man's home.

In the case of *U. S. vs. Blich*, 45 Fed. (2nd) 627, the court held that where agents had been informed by a reliable person, whom they believed, that transportation was to take place at a certain date and place and where the defendant had previously been convicted for violating liquor ordinances, that this was insufficient to constitute probable cause for the search of an automobile without a warrant. Syllabus 3 of that case reads as follows:

> "3. Probable cause for search of an automobile for liquor transportation without warrant should be such as might be established in competent tribunal as basis for warrant."

In the case at bar, the search is not merely that of an automobile, *but is a search of a garage in which the automobile was located.*

It is conceded that the automobile was in the garage and the defendant was walking away from the automobile at the time of the search. This is not a case where an automobile is stopped and searched on the highway. It is a case where private premises were invaded, and in the process of this invasion, an automobile is searched, in the garage, and within the curtilage of the private premises.

This case is comparable to one where a package is located in a garage, the garage is invaded and the package broken open and searched. The automobile, like the package, was within the garage and the garage was invaded by the officers without probable cause and without any search warrant whatsoever.

At the time the officers entered upon the premises of the defendant they had absolutely no cause to believe that the defendant was transporting *tax unpaid liquor* intended for resale. Their justification for this trespass is based on facts which are not sufficient to lead a reasonably discreet and prudent man to believe that *tax unpaid liquor* which was intended for resale was illegally in defendant's automobile.

The officers claim probable cause based on information obtained from an informant, whom they refused to disclose, but whom they believed to be reliable. They saw the defendant early in the evening leave the house at 10838 Drexel Avenue with three women. Subsequently the defendant returned to the home around midnight. They heard a rustling of heavy paper against a hard surface. Then they saw the defendant leave the premises at 10838 Drexel Avenue and proceed to East 105th Street. *The driver of the car was not in any hurry nor did he appear to be running away.* In fact, the agent, Sidney M. Bowes, testified that his movements after he left 10838 Drexel Avenue were not suspicious.

The court held these facts sufficient to constitute probable cause permitting the agents to invade the sanctity of the defendant's home, to go into his garage, to forcibly break open the trunk compartment of the defendant's automobile and search this automobile.

It will certainly be conceded that the agent could, by no stretch of the imagination, have obtained a search war-

rant, and, therefore, could not make such search without warrant.

If the facts within the knowledge of the Government agents could not justify the issuance of a search warrant, those same facts could not justify the search of the automobile in the garage of the defendant's home.

Furthermore, the officers could have obtained a warrant to search the defendant's automobile if they believed they had reasonable and probable cause so to do, after the automobile had been placed in the defendant's garage. It would be a simple matter to have one of the agents obtain the search warrant while the other watched the premises to see that the automobile did not leave.

In the case of *United States vs. Kaplan*, 89 Fed. (2nd) 869, the Court on page 871 of its opinion says:

> "We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportion in the residential part of Brooklyn. Perhaps so; any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in *Taylor vs. United States*—might then have been valid. It takes time to break up a still and take the parts away; if the attempt was made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or a commissioner, whose action would at least have put a different face upon their subsequent proceedings."

According to the testimony of the agents, they knew many hours prior to the arrest and seizure that that certain Dodge car would transport the "phoney whiskey."

Surely in all those hours, one agent could have gone to the judge or commissioner and obtained a search warrant if they thought the evidence sufficient.

We therefore contend that the invasion of the defendant's garage was a direct violation of the defendant's rights as guaranteed to him by the Constitution of the United States and by the Constitution of Ohio.

**2. The Garage that was Searched was that of a Private Dwelling.**

It is contended that the search of the garage in which the defendant's automobile was parked at the time of the search and seizure of the evidence herein, is part of the private dwelling occupied by the defendant since it is within the curtilage, and that, therefore, the search made in this matter was a search of a private dwelling.

The Fourth Amendment of the Constitution of the United States reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provisions of this article of the Constitution and the Ohio Constitution, Article 1, Section 14, are substantially a recitation of what was a part of the common law and is intended to protect every citizen against unreasonable encroachment upon the sanctity and privacy of his private dwelling.

In the case of *United States vs. Slusser*, 270 Fed., 818, it was held that a garage close to the dwelling was a part of the home.

In the case of *Temperani vs. United States*, 299 Fed., 365, the court went into the question as to whether or not the term "private dwelling" as used in the National Prohibition Act is synonymous with the words "dwelling

house" as handed down to us in earlier decisions. In that case a garage underneath a dwelling house had been searched. A motion was made to suppress the evidence because of an unlawful search. The court said (quoting from *Bare vs. Com.*, 122 Va. 783; 94 S. E. 168):

> "We know of no analogy in the law for the construction of this language except such as is found in the common and statute law referring to arson, burglary, and the homicide and assault cases, where the prisoner claims to have committed the alleged crime in self-defense after having retreated to his castle or his home. As construed by the courts from the earliest to the latest times the words 'dwelling' or 'dwelling house' have been construed to include not only the main house but all of the cluster of buildings convenient for the occupants of the premises generally described as 'within the curtilage.'
>
> This rule is supported by Hale, Blackstone, Greenleaf, Bishop, and all the text writers. Within this definition the garage comes clearly within the protection of the Constitution."

See also *People vs. Taylor*, 2 Mich. 250; *Forni vs. United States*, 3 Fed. (2nd) 354; *Guaresimo vs. U. S.*, 13 Fed. (2nd) 848; 12 A. L. R., 1179; *U. S. vs. Palma*, 295 Fed., 149.

In the case of *Taylor vs. U. S.*, 286 U. S. 1, 76 L. Ed. 951, the agents searched a garage without a warrant, found and seized liquor. Their suspicion was based on information that the defendant was violating the Prohibition Law. This suspicion was confirmed by the agents through their senses, in that they smelled the odor of liquor, and was confirmed by peeping through a chink in the garage which stood adjacent to the defendant's dwelling house. The court held that under those facts the officers were not justified in breaking into the garage and seizing the liquor in order to obtain evidence to establish the guilt of the defendant. The syllabus reads as follows:

"2. Suspicion that a person engaged in violations of the prohibition law, confirmed by the odor of whiskey and by peeping through a chink in a garage standing adjacent to his dwelling, and part of the same premises, will not justify prohibition officers in breaking into the garage and seizing the whiskey for the purpose of obtaining evidence of guilt."

Justice McReynolds delivered the opinion of the court. Quoting from the opinion on page five:

"During the night of November 19, 1930, a squad of prohibition agents, while returning to Baltimore City, discussed premises No. 100 Curtiss Avenue, of which there had been complaints 'over a period of about a year.' Having decided to investigate they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building—is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are parts of the same premises.

As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight they looked through a small opening and saw many cardboard cases which they thought probably contained jars of liquor. Thereupon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken upon the hope of obtaining evidence upon which to indict and convict him. We think the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime, but its presence alone does not strip the owner of the building of his constitutional guarantee against unreasonable search."

In the case of *Wakkuri vs. U. S. of America,* 67 Fed. (2nd), 844, decided by the Circuit Court of Appeals for the 6th Circuit on December 11, 1933, the court held that a bathhouse adjacent to a dwelling house on a small farm was within the curtilage of the home and within the protection of the Constitution against unreasonable searches and seizures.

In the case of *U. S. vs. Raho,* 10 Fed. Supp. 660, the syllabus reads as follows:

> "Officers seeing smoke from chimney of shanty near restaurant, and smelling odor of mash or alcohol but not seeing commission of crime until they entered premises and opened door of shanty held not justified in searching property without warrant."

The Court in its opinion states the garage was not searched. We respectfully submit that such a statement is fallacious in view of the facts in this case.

The evidence was that the search of the automobile was made after the defendant had driven his car into the garage located on the premises of the defendant's residence.

While the automobile was the object that was searched, the search without a doubt was made *in the garage* of the defendant, and *therefore was a search of the garage itself.*

If instead of the automobile in a garage, the search had been made of the *drawers of a dresser located in the home of the defendant,* clearly it could not be said that the search was not made of the defendant's home.

The Court's position that the garage was not searched is clearly erroneous.

We, therefore, contend that the garage which was searched by the officers without a search warrant was part of the curtilage of the defendant's private dwelling, and, therefore, the search made was that of a private dwelling.

**B. CONFIDENTIAL INFORMER.**

The Court of Appeals held that by reasons of public policy the identity of the confidential informer need not be disclosed.

The Trial Court sustained objections and the following questions were presented by the defendant relating to the confidential informer:

(a) "Q. Did you receive any information which you considered reliable concerning his action in Charleston, West Virginia?

Mr. Scott: I object, your Honor.
The Court: Objection sustained.
Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: Exception."

(Page 29, Record.)

(b) "Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: May I be heard on that?
The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I shall not re-examine the question. I have examined it again within the last 48 hours.
Mr. Doyle: May I dictate my offer?
The Court: Certainly.
Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness re-

ceived information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable."

(Pages 34 and 35 Record.)

(c) "Q. What was the reason for your going out there in this vicinity?

A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception."

(Page 28, Record.)

It was the intention of the defendant by this line of questioning to determine the name of the confidential informer upon whose information the Government agents claimed to rely. The defendant had an absolute right to know the name of the confidential informer; first, so that the Court might determine whether or not the officers had reasonable cause to believe this informer, and secondly, so that the defendant might, if possible, impeach the testimony of the Government's witnesses.

One of the facts, upon which the agents based their search of the defendant's premises without a warrant, was that they had been informed that a certain automobile of a certain license number would transport liquor at a certain time. This information was obtained by the agents from one whom the agents called a "confidential informer," and upon whose information they relied. The court, however, refused to allow the counsel for defendant to cross

examine the Government witnesses as to the name of the confidential informer, nor did the court permit counsel for defendant to show by this testimony that the judgment of the Government agent as to whether or not the information received by him was reliable, had been proved faulty at a former trial of this matter.

If the defendant had been permitted to obtain an answer to this question, the testimony, as indicated by the proffer of testimony, would have been that, at the previous trial of this matter, the witness had introduced evidence which he deemed reliable which was later, after investigation by the Attorney General of the United States, proven to be false, prejurious and unreliable.

The evidence would have shown that after a former conviction of this defendant based on this same indictment, an investigation of the charges of the defendant that the testimony which the officers deemed reliable was unreliable, false and perjurious, the government confessed error in the Court of Appeals, upon which confession of error, the cause was reversed and remanded and the present trial had.

In the case of *U. S. vs. Blich*, 45 Fed. (2nd) 627, the agents had been informed by a reliable person, whom they believed, that the defendant who had previously been convicted of violating liquor ordinances, would transport liquor at a certain place and date. The agents, however, refused to state the name of their informant. The court held that the agents should be required to give the name of the informant. The syllabus of that case reads as follows:

> "4. Officers making searches and seizures for transportation of liquor, on public highway, without warrant *must, to establish probable cause, disclose every element making up case.* (The rule reasonably includes the *source* of their information, *so that the court may determine whether,* under all the circumstances,

*a case of probable cause has been established,* and perhaps as well to restrict informers to sincerity of purpose.)"

Thus, in the case at bar, the defendant was entitled to know the name of the confidential informer and the source of the information allegedly obtained by the Government agent *so that the court might determine whether a case of probable cause had been established.*

In Cornelius on "*Search and Seizure*" at page 124, par. 41, it is said:

> "Information furnished by another that an offense has been committed may or may not constitute probable cause justifying arrest without warrant, the sound rule being that the information relied upon must be such as will justify a reasonably prudent man in believing that the particular person arrested was guilty of felony.
>
> Again we find that general principles aid us but little in determining what constitutes probable cause but an examination of the cases cited in (1) and (2) to note 42 indicates the rule that the information imparted should be by some person who has actually observed such facts as would constitute probable cause to believe the offenses had been committed."

See also *People vs. Miller,* 245 Mich. 115, 222 N. W. 151.

The agents could not have searched the premises and automobile of the defendant without a warrant unless they had probable cause to do so. Under the authorities cited herein probable cause must be based on facts such as would lead a reasonably cautious and prudent man to believe that tax unpaid liquor was being transported. It is therefore our contention that the defendant was entitled to know the source of the agents' information so that the court might determine whether or not a case of probable cause had been established.

It would be a gross miscarriage of law to place entirely in the hands of the agents the right to adjudicate whether or not they had probable cause to search private dwellings, by giving them the sole right to determine the reliability of their information.

It is a great injustice to permit them to keep concealed the source of their information, so that their testimony can not be refuted. Whether the information was true or false, reliable or unreliable, the citizen whose premises are searched without warrant must submit to and is bound by the opinion of the agents that their information was reliable.

To so hold would be a violation not only of the terms and purposes of the 4th Amendment of the Constitution, but would be contrary to the principles enunciated by our courts throughout the years. It would permit any officer upon any justification that he deemed sufficient to invade the sanctity and privacy of a man's home and to subject those premises to a search without a warrant. This clearly is not and cannot be the law.

Furthermore, under the rules of evidence, a witness should be required to answer such questions as are material to the issue in order to give the defendant an opportunity to impeach the testimony of the witnesses or to investigate the truth thereof. The names of the informant upon whom the agents relied is, certainly, material to the issue of probable cause.

The Court refused to strike from the testimony the statement made by the Government witness that he had received reliable information from the confidential informer. (Record, 28.) This information was purely hearsay and was not a statement made in the presence of the defendant. Under these circumstances, the Court, by its ruling, denied to the defendant his constitutional right to face his accusers and to answer the charges allegedly made against him by the so-called reliable informer.

We therefore contend, that since the search without a warrant in the case at bar was based on information obtained from a "confidential informer," that the defendant and the Court were entitled to know the name of that informer and all the circumstances, so that the Court could determine whether or not the information was given by a reliable informant.

We therefore contend, that the court below erred in sustaining the objection to the question as to the name of the confidential informer.

**C. MOTION FOR NEW TRIAL.**

We submit that the Court of Appeals erred in not reversing and remanding this case for failure of the Trial Court to grant defendant's motion for new trial based on the specifications of error hereinabove disclosed. For the foregoing reasons, it is respectfully submitted that the judgment of the Trial Court and its affirmance of said judgment by the Court of Appeals should be reversed and a new trial be awarded by this Court.

A. L. GREENSPUN,
*Attorney for Petitioner.*

GERALD A. DOYLE,
*Of Counsel.*

## APPENDIX A.

### Opinion of the United States Circuit Court of Appeals.

No. 7773.

UNITED STATES CIRCUIT COURT OF APPEALS.

SIXTH CIRCUIT.

HYMAN SCHER, alias WILLIAM SCHER,
*Appellant,*

vs.

THE UNITED STATES OF AMERICA,
*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Decided February 18, 1938.

Before Moorman and Allen, Circuit Judges, and Nevin, District Judge.

*Per Curiam.* The appellant was found guilty under two counts of an indictment charging him with unlawful possession and transportation of distilled spirits, the containers of which did not have revenue stamps affixed thereto. The offenses charged were violations of Section 1152a, Title 26, U. S. C.

Investigators of the Alcohol Tax Unit at Cleveland, Ohio, received confidential information from a source previously proved to be reliable that a load of tax-unpaid distilled spirits in bottles would be taken from a given address in a certain car, the make, model, and license number of which were given, at about midnight of December 30, 1935. The investigators saw appellant call at the designated address in a car of the specified make, model and license num-

ber, at about nine P. M., and leave about ten-thirty, carrying a package and accompanied by three women. The car returned about midnight. It was parked without lights in the driveway at the rear corner of the house for about half an hour. From the opposite side of the street the investigators heard the rear door of the house open, and several times heard the sound of heavy paper being scraped across a hard surface, after which they heard two doors slam. Appellant then drove the car, which appeared to be heavily loaded, to his residence. He drove into the garage, and was in the act of getting out of the car when one of the investigators approached with a flashlight, and asked if the car was hauling bootleg whiskey. Appellant said it was for a party, and in reply to the question as to whether it was tax paid, said that it was "Canadian whiskey," and that it was in the trunk of the car. In the car eighty-eight bottles without tax stamps were found in fourteen packages similar to that which appellant had previously carried from the premises under observation.

Appellant's principal contentions are (1) that the court erred in denying appellant the right to cross-examine as to the identity of the informant, and (2) in overruling appellant's motion to suppress the evidence.

As to the first contention, for reasons of public policy the identity of a confidential informant must be kept secret, and such sources need not be disclosed. *Segurola v. United States,* 16 Fed. (2d) 563 (C. C. A. 1); *Vogel, Extr., v. Gruaz,* 110 U. S. 311; *Shore v. United States,* 49 Fed. (2d) 519 (C. A. D. C.); *McInes v. United States,* 62 Fed. (2d) 180 (C. C. A. 9); *Wilson v. United States,* 65 Fed. (2d) 621 (C. C. A. 3); *Goetz v. United States,* 39 Fed. (2d) 903 (C. C. A. 5).

As to the second contention, appellant moved to suppress evidence obtained as a result of the search, on the ground that the search was without a warrant or without

probable cause, and in violation of Section 14, Article 1, of the Constitution of Ohio, and the Fourth and Fifth Amendments to the Constitution of the United States. The District Court overruled this motion, and its action was correct. The garage was not searched. Appellant did not oppose the search of the car. The circumstances presented facts within the personal knowledge of the agents, sufficient to lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile. There was no unlawful search and seizure. *Husty v. United States*, 282 U. S. 694; *Carroll v. United States*, 267 U. S. 132, 149; *Wisniewsky v. United States*, 47 Fed. (2d) 825 (C. C. A. 6); *Ferracane v. United States*, 47 Fed. (2d) 677 (C. C. A. 7). *United States v. Kind*, 87 Fed. (2d) 315 (C. C. A. 2) is distinguishable upon the facts.

The judgment is affirmed.

Judge Moorman took no part in the decision of this case.

## APPENDIX B.

### Order of United States Circuit Court of Appeals Amending Opinion.

No. 7773.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

HYMAN SCHER

vs.

UNITED STATES OF AMERICA.

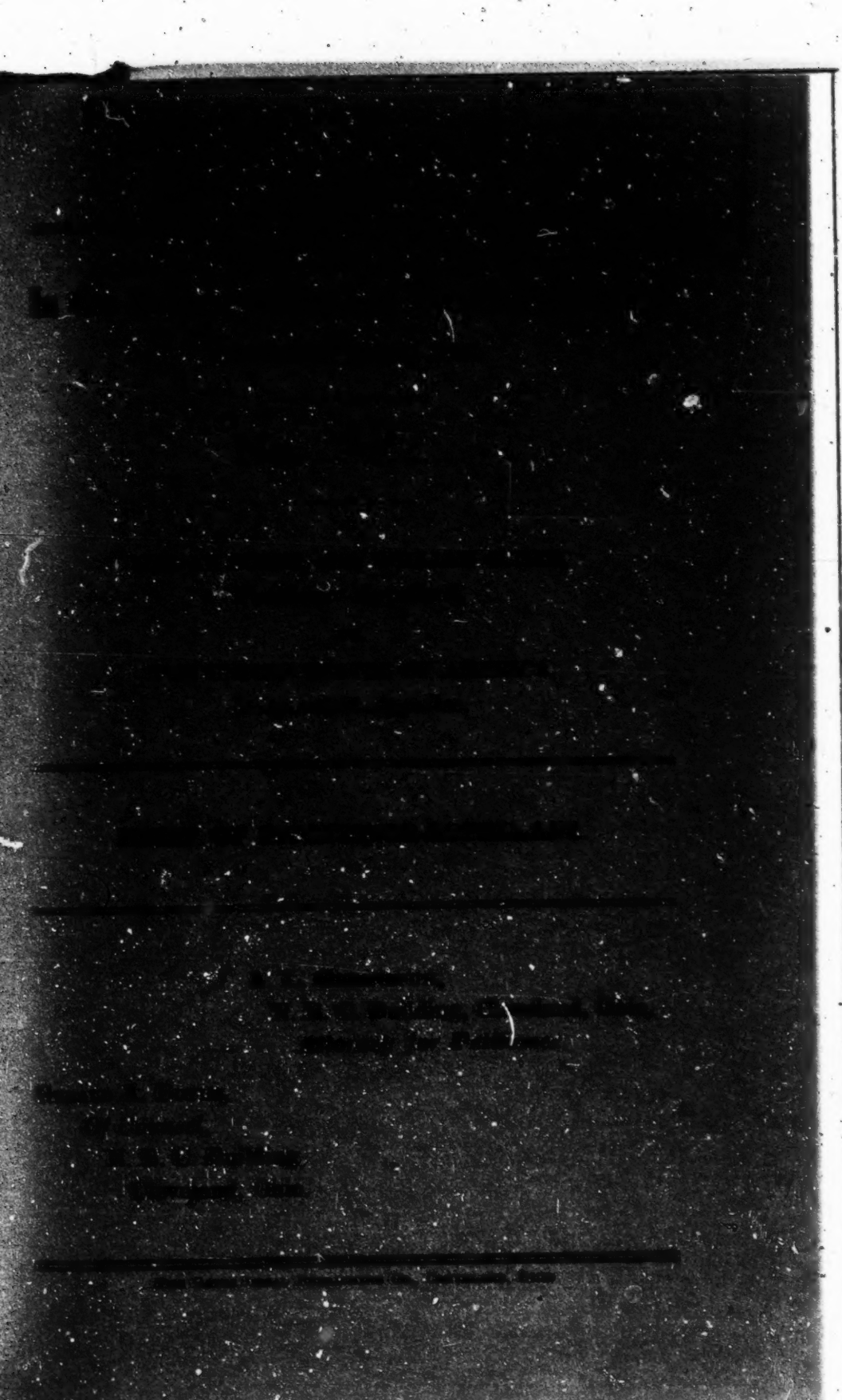
Before: Hicks, Allen and Nevin, *JJ.*

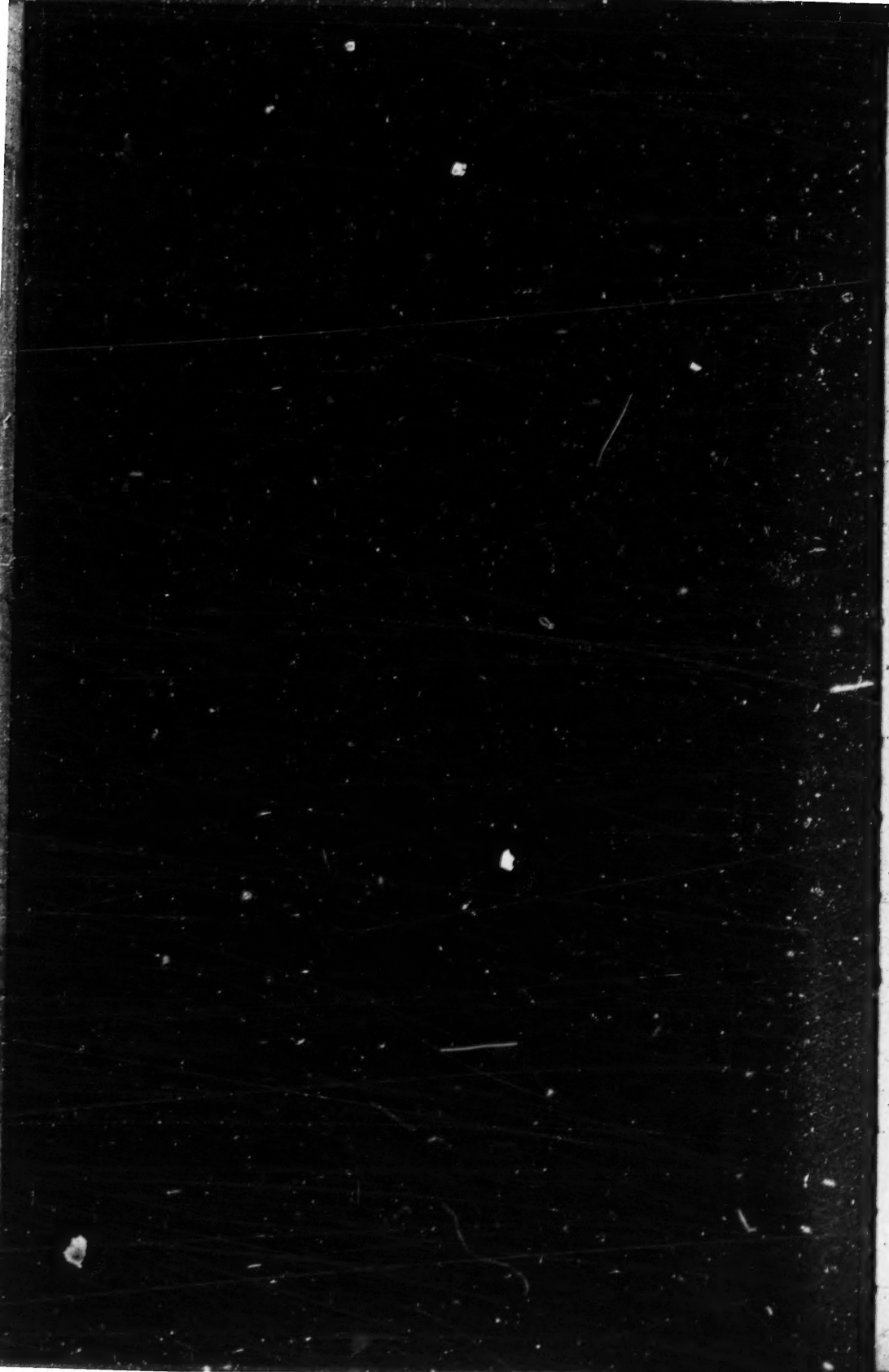
It is ordered that the opinion in the above case be amended by striking out of the next to last paragraph thereof the following sentence: "Appellant did not oppose the search of the car."

FLORENCE E. ALLEN,

*U. S. Circuit Judge.*

Filed: April 13, 1938.





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## AUTHORITIES CITED.

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**Text.**



**Constitutional Provisions.**

# In the Supreme Court of the United States

**OCTOBER TERM 1938.**

## No. .....

HYMAN SCHER, alias WILLIAM SCHER,
*Petitioner-Appellant,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent-Appellee.*

## BRIEF OF PETITIONER-APPELLANT.

### I.

### GENERAL STATEMENT.

(All emphasis in this brief is ours unless otherwise designated.)

Hyman Scher was indicted in the United States District Court for the Northern District of Ohio on May 31, 1936, for alleged violation of Section 1152A, title 26, U. S. C. A. which creates and defines offenses against the Internal Revenue Laws of the United States.

Indictment contained two counts, one for the unlawful possession of a quantity of distilled spirits, the immediate containers not having affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue tax.

The second count alleged that the petitioner-appellant did unlawfully transport, in a Dodge de luxe sedan automobile, a quantity of distilled spirits the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue tax imposed thereon.

The petitioner-appellant filed a motion to suppress the evidence obtained by the search made by the Internal Revenue agents on the ground that such search was not based upon probable or reasonable cause and was in violation of the petitioner-appellant's rights under the State and Federal Constitution. This motion was overruled by the District Court on May 5, 1937 and an opinion is filed by Honorable Samuel H. West, Judge of the District Court of the United States, trial Judge. (Record 7.)

The case then proceeded to trial and the petitioner-appellant was found guilty under both counts. The verdict was returned on May 7, 1937. (Record 10 and 11.)

Petitioner-appellant's motion for a new trial was overruled (Record 12 and 13) and the Court sentenced the petitioner-appellant to imprisonment for a period of one year and one day, and the Court further imposed a fine of Three Hundred Dollars ($300.00) and costs.

A notice of appeal was then filed by the petitioner-appellant (Record 13) and the principal errors relied upon by the petitioner-appellant in the Circuit Court of Appeals for the Sixth Circuit was the action of the trial Court in overruling the motion to suppress the evidence, and its ruling on objections to questions relating to confidential informants. The Court of Appeals, on February 18, 1938, affirmed the judgment of the trial Court.

Subsequently a petition for rehearing was filed in the United States Circuit Court of Appeals for the Sixth Circuit and on April 13, 1938 the petition for rehearing was denied. Petition for writ of certiorari was filed in this Court on May 18, 1938 and the order allowing certiorari filed May 31, 1938. (Record 78.)

## II.

## STATEMENT OF FACTS.

### A. Facts as to Motion to Suppress Evidence.

The petitioner-appellant, Hyman Scher, resides with his parents at 10025 Olivet Avenue, Cleveland, Ohio, in a two family house with a double garage in the rear of the premises, located about six feet to the rear of the house and within the curtilage of the home, and had so resided for the past fourteen years. (Record 19.) The home was situated in a strictly residential district and no business was carried on in the premises or in the vicinity.

The defendant was never charged with trafficking in liquor and had never been arrested or convicted on any criminal charge whatsoever, nor did the revenue officers ever have any complaints against the petitioner-appellant.

On December 31, 1935, the Revenue Officers received information from a source which the Revenue Officers said had heretofore found to be reliable to the effect that "phony" whiskey was being sold from certain premises at 10838 Drexel Avenue, Cleveland, Ohio, and that at midnight or shortly thereafter a load of this whiskey would be taken from those premises in a Dodge car, license LX 418.

The Revenue Agents observed those premises from 8 o'clock P. M. on that day. At about midnight a Dodge automobile drove up toward the garage of the premises at 10838 Drexel Avenue. The lights of the car were out and the car remained in said driveway for about one-half hour. One of the officers heard something heavy set down like wood, and heard it slide, like it was heavy paper, across a wooden surface, heard the door slam, the trunk slam and the door of the car slam. The car then was driven out of the driveway and the Revenue Agents followed it to a gasoline station several blocks away where the car stopped. The man later identified as the petitioner-appellant alighted, the gasoline station attendant put gasoline

in the tank and the petitioner-appellant walked across the street and returned with a newspaper in his hand.

The car then was driven about two or three blocks to Olivet Avenue where the petitioner-appellant drove his car slowly to a stop and then turned into the driveway of his home located at 10025 Olivet Avenue, Cleveland, Ohio.

The petitioner-appellant drove said automobile into his garage, turned off the lights and was in the act of getting out of the car when one of the investigators, with a flash light in his hand, approached the petitioner-appellant and asked the petitioner-appellant if he was hauling bootleg liquor. In response to a question by the investigator if he was hauling bootleg whiskey, petitioner-appellant replied, "Just a little for a party."

In a reply to a question of the officers as to whether it was tax paid, the petitioner-appellant replied, "It is Canadian whiskey," and in response to the investigator's question said it was in the trunk of the car. The Revenue Agents then forced open the trunk and found therein eighty-eight bottles without tax stamps on the bottles or cases. The petitioner-appellant was then arrested and the automobile and bottles confiscated. (Record 24-27.) The search was admitted to have been made without a search warrant.

**B. Facts as to Confidential Informer.**

Upon the trial of this cause in the District Court, certain questions relating to the identity of the informer and the source of the information obtained by the Revenue Agents and which the Revenue Agents considered reliable were objected to by counsel for the Government and the objections sustained by the Trial Court to which the petitioner-appellant excepted. Counsel for petitioner-appellant inquired of the Revenue Agents whether or not the Revenue Agents had received confidential information concerning the petitioner-appellant which he had considered reliable

and which later turned out to be unreliable, false and perjurious. (Record 29.) Further the Court sustained objections over the exception of the petitioner-appellant as to a question as to the identity of the confidential informer.

Counsel for petitioner-appellant made a proffer to show by this line of cross examination that the Revenue Agent had received information which he considered reliable at a former trial of the petitioner-appellant, which testimony, after an investigation by the Attorney General of the United States proved to be false, perjurious and unreliable: (Record 34 and 35.)

The Court overruled an objection the Answer of the Revenue Agent that he had received reliable information from a confidential informer as to a certain Dodge automobile, to which petitioner duly excepted. (Record 28.)

The Court refused to permit counsel for petitioner-appellant at any time to cross examine or inquire from the Revenue Agent as to the identity of the alleged confidential informer and the source of the confidential information and the reliability thereof.

## III.

## ASSIGNMENT OF ERROR IN THE COURT OF APPEALS.

Exceptions were duly taken to the trial Court's action in overruling the motion to suppress the evidence, in overruling petitioner-appellant's motion for a new trial, and also as to the rulings of the Court upon the questions relating to the confidential informer relied upon by the Revenue Agents to justify their search of the petitioner-appellant's home.

The substance of the errors principally relied upon in the Court of Appeals, briefly stated, is as follows:

1. The Court erred in overruling petitioner's motion to suppress evidence on the ground that the search was unlawful and not based upon probable cause, and was in vio-

lation of the petitioner-appellant's right under the State and Federal Constitutions.

2. The Court erred in refusing to permit petitioner-appellant to examine witnesses as to the identity and reliability of the confidential informer and as to the reliability of the information furnished the Revenue Agents.

3. That the Court erred in overruling the petitioner-appellant's motion for a new trial based upon the assignments of error hereinabove set forth.

## IV.

## ACTION OF THE COURT OF APPEALS AND HOLDINGS BELIEVED TO BE ERRONEOUS.

The Court of Appeals affirmed the judgment of the Court below and after making a statement of facts, as appears in the opinion, and which is attached hereto and marked Appendix A, stated the following conclusions of law:

1. The Court found that there was no unlawful search and seizure and that the circumstances presented facts within the personal knowledge of the agents sufficient to lead a reasonably discreet and prudent man to believe that liquor was unlawfully possessed in the automobile.

It is respectfully submitted that the record contains no evidence to show that there was probable cause to believe that *tax unpaid* liquor was possessed or being transported by the petitioner and that there was therefore, no probable cause for the search without a warrant, and therefore that the search and the seizure was in violation of Section 14, Article 1 of the Constitution of Ohio and the 4th and 5th Amendments to the Constitution of the United States.

2. The Court further held that "the garage was not searched."

It is respectfully submitted that the record clearly shows that the garage of the petitioner-appellant was located within the curtilage of the petitioner's home and residence; that the automobile at the time of the search was at rest and in said garage.

It is respectfully submitted that the Court erred in holding that the garage was not searched.

3. The Court found that for reasons of public policy the identity of a confidential informer must be kept secret and such source need not be disclosed.

It is respectfully submitted that this ruling of the Court is erroneous in that the defendant was thus precluded from cross examining the witness so that the Court, and not the Revenue Agents themselves, might determine whether or not the information received by the Revenue Agents was reliable information, or whether it was pure speculation and hearsay.

## V.

## OPINION OF THE COURT.

1. The opinion in the United States Circuit Court of Appeals for the Sixth Circuit was handed down on February 18, 1938 and is reported in 95 Fed. (2) 64. A copy of this opinion is attached hereto and marked "Appendix A."

2. Subsequently a petition for rehearing was filed by the petitioner-appellant which was denied on April 13, 1938. On that same date, to-wit: April 13, 1938, the Court of Appeals made an order amending its opinion by striking out next to the last paragraph thereof, the following sentence, "Appellant did not oppose the search of the car." A copy of said order is attached hereto and marked "Appendix B."

## VI.

## SPECIFICATIONS OF ERRORS.

The judgment of the Court of Appeals and the Trial Court should be reversed and the cause remanded for a rehearing upon the following grounds:

1. The Trial Court should have sustained the petitioner-appellant's motion to suppress the evidence, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so, for the following reasons:

(a) That there was no reasonable or probable cause such as would lead a reasonably discreet and prudent man to believe that tax unpaid liquor was possessed and being transported by the petitioner-appellant.

(b) That there was an unlawful search of the petitioner-appellant's premises and an unlawful seizure in violation of the petitioner-appellant's rights under the United States and Ohio Constitutions.

(c) That the garage in which the automobile was located and where the search was made, was within the curtilage of the petitioner-appellant's home and therefore within the protection of the Constitutional guarantees against unreasonable search and seizure.

2. In that the Trial Court should have permitted petitioner-appellant to cross-examine and examine witnesses as to the identity of the confidential informer and the source of the information so that the Court might determine whether or not the witness had reasonable cause to believe this informant and whether the information was reliable; secondly, petitioner-appellant was entitled to know the identity of the informer so that he might, if possible, impeach the testimony of the Government witnesses.

The Court of Appeals erred in failing to reverse and remand the cause because of error of the Trial Court in refusing to permit said examination as aforesaid.

3. The Trial Court erred in overruling petitioner-appellant's motion for a new trial, and the Court of Appeals erred in failing to reverse and remand the cause because of its failure to do so for the reasons first above stated.

## VII.

## ARGUMENT.

(In this brief and argument, petitioner-appellant will be designated as defendant.)

### A. MOTION TO SUPPRESS EVIDENCE.

#### 1. The Search of the Premises Was in Violation of Defendant's Rights.

Under and by virtue of the terms of the Fourth Amendment of the Constitution of the United States, the defendant had a right to have his private dwelling and, therefore, his garage, exempt from unreasonable search and seizure.

In the case of *Grau vs. United States,* decided November 7th, 1932, 53 S. Ct. Rep., page 38, the affidavit for the search warrant states that the affiant went around and about the premises therein described and saw persons hauling cans, commonly used in hauling whiskey, and what appeared to be corn sugar up to and into the place and saw the same car or truck haul similar cans apparently heavily loaded away from there and smelled odors and fumes of cooking mash coming from the place and he said there was a still and whiskey mash on the premises. We quote from the opinion on page 40 as follows:

> "The affidavit fails to state the place to be searched is not a private dwelling, and the record affirmatively shows it was. At most the deposition charges the manufacture of whiskey; no averment of sale is made; indeed no facts are given from which sale, on or off the

premises described, necessarily is to be inferred. The Court below, however, held that the facts set forth warranted a belief that the dwelling was being used as headquarters for the merchandising of liquor. This was deemed a sufficient compliance with the statutory permission for search of a dwelling if 'used for the unlawful sale of intoxicating liquor.'

"(2, 3) The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. Those guaranties are to be liberally construed to prevent impairment of the protection extended. *Boyd vs. United States,* 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; *Gouled vs. United States,* 255 U. S. 298, 304, 41 S. Ct. 261, 65 L. Ed. 647; *Go-Bart Co. vs. United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374. Congress intended, in adopting section 25 of title 2 of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose.

"(4, 6) A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles vs. United States* (C. C. A.) 284 F. 208; *Wagner vs. United States* (C. C. A.) 8 F. (2nd) 581), and would lead a man of prudence and caution to believe that the offense has been committed (*Steele vs. United States,* 267 U. S. 498, 504, 45 S. Ct. 414, 69 L. Ed. 757). Tested by these standards, the affidavit was insufficient. While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made.

"The process should have been quashed, and the articles seized delivered to the petitioner. Their admission as evidence was error, and the judgment must be reversed.

"Reversed."

"Mr. Justice Stone and Mr. Justice Cardozo are of the opinion that the judgment should be affirmed."

We quote from *Angello vs. U. S.*, 269 U. S. 20; 51 A. L. R. 413:

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. *Boyd vs. United States*, 116 U. S. 616, 624 *et seq.* 630, 29 L. Ed. 746, 748, 751, 6 Sup. Ct. Rep. 524; *Weeks vs. United States, supra*, 393 (58 L. Ed. 655, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177); *Silverthorne Lumber Co. vs. United States, supra*, 391 (64 L. Ed. 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182); *Gouled vs. United States*, 255 U. S. 298, 308, 65 L. Ed. 647, 652, 41 Sup. Ct. Rep. 261. The protection of the 4th Amendment extends to all equally;—to those justly suspected or accused as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search warrants for that purpose."

Not only is the search illegal because the Federal officers made their way into part of a private dwelling without a warrant, but also because they were trespassers within the curtilage of the defendant's home when they discovered evidence of the crime.

The constitutional prohibition against unreasonable searches and seizures is construed liberally to safeguard the rights of privacy. *U. S. vs. Lefkowitz*, 285 U. S. 452, 52 S. Ct. 420; *Go-Bart Importing Co. vs. U. S.*, 282 U. S., 344, 51 S. Ct. 153; *Taylor vs. U. S.*, 286 U. S. 1, 52 S. Ct. 466; *Sgro vs. U. S.*, 53 S. Ct. 138.

In the case of *U. S. vs. Slusser,* 270 Fed., 818, the officers entered upon the private premises and searched *an automobile which was in the garage. That search was held illegal.*

In the case of *United States vs. DiCorvo,* 37 F. (2d) 124, the court held that an officer had no right to enter the *private driveway* of a farm house for the purpose of discovering intoxicating liquor.

In the case of *Elrod vs. Moss,* 278 Fed. 124, the court held that an officer must have personal and direct knowledge through his hearing, sight or other senses of the commission of the crime of which the defendant is accused.

It is clearly the law that a search of private premises, unreasonable and not based on probable cause at the time it was made, is not made lawful by what is found after the search is made, and that a seizure on mere suspicion is not justified by the confirmation of that suspicion. See *Gauske vs. United States,* 1 F. (2d) 620; *U. S. vs. Olmstead,* 7 F. (2d) 760; *U. S. vs. Spallino,* 21 F. (2d) 567.

In the case of *Wakkuri vs. U. S.,* 67 F. (2d) 844, decided by the Circuit Court of Appeals for the 6th Circuit on December 11, 1933, the officers had observed smoke coming out of a chimney in a bath house, located about 80 feet from the defendant's main dwelling house. The officers, also, had received complaints that the liquor law was being violated. On the morning before the search was made, two of the officers had concealed themselves near the bath house and could smell odors of cooking mash. They saw puffs of steam coming out of a vent in the building and saw spent grain near by. The officers had no warrant of any kind. The officers then entered upon the premises of the defendant, knocked upon the door of the bath house and when the door was opened by the defendant, saw the defendant standing beside a still about 3 feet from the door, saw whiskey running into a 12 gallon container, and saw

barrels, kegs and jugs in the bath house. The officers then placed the defendant under arrest, entered the building, and seized some of the whiskey and paraphernalia for evidence. The court held that the search of the bath house was illegal and a violation of the defendant's constitutional rights. The syllabus of said case reads as follows:

> "1. Bath house adjacent to dwelling house on small farm held within curtilage of home and within protection of the Constitution against unreasonable searches and seizures.
>
> 3. Any search of private dwelling without a search warrant is at least prima-facie unlawful.
>
> 4. That which might not be done with invalid search warrant, the only kind which could have been obtained, could not be permitted without any warrant.
>
> 5. Search of premises without warrant held not justified on grounds defendant was found in dwelling in commission of crime, where at that time officers had no knowledge of facts which had justified arrest and supported conviction."

The court held that the evidence as submitted by the officers would have been insufficient to obtain a search warrant; and, therefore, the search was unlawful and the motion to suppress should have been granted. The court, on page 845, of the *Wakkuri* case, says:

> "Just as the validity of a search may not be judged by what it brings to light, so the right to search must be decided by the situation as disclosed before the search is made."

In the following cases where automobiles were searched on the road, the court held the search illegal by reason of the fact that the officers did not have probable cause to search the automobile without a warrant.

In the case of *U. S. vs. Allen,* 61 Fed. (2nd), 320, the agents had information that an automobile was going to

haul liquor One of the automobiles was to be a Studebaker with blue headlights, a driving light in the center and in which the rear glass of the right hand door had been broken and mended with tape. The agents watched the road, and saw such a Studebaker driving down the road. The automobile appeared to be heavily loaded and there was mud on the back of the car. The court held that the motion to suppress, based on search without warrant, should be sustained on the ground that there were no facts such as to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported.

In the case of *Emite vs. U. S.*, 15 Fed. (2nd) 623, the officers were informed that cars parked at a certain ice plant hauled bootleg liquor from that plant.. The officers had seen the defendant's car parked by the side of the ice plant and had seen it leave the plant. The car appeared to be heavily loaded and weighed down on the springs, and the officers in following the car noticed that the car went over bumps very carefully. The officers stopped the car on the road without a warrant and found liquor in the car. The court held that under these facts, there was no probable cause that the defendant was unlawfully in possession of and transporting liquor, and the evidence should have been excluded.

In the case of *Brown vs. U. S.*, 4 Fed. (2nd) 247, the officer saw the plaintiff park his car at the curb, remove some baggage from the back part of the car and start up the street. The package that the plaintiff carried was not smooth and from its appearance might contain bootleg whiskey. The officer arrested the plaintiff. Prior to that the officer had been informed that the plaintiff was a bootlegger and the license of the car was furnished, but the source of the information was not disclosed. The officer testified that he had seen the plaintiff deliver two packages before that time but testified that he did not know for cer-

tain what the packages contained. The court held that the officer was acting merely on suspicion and held the search illegal.

In the case of *U. S. vs. Alspach,* 12 Fed. Supp., 293, two agents had information that the defendant was delivering tax unpaid liquor. The agents saw the defendant come out of the house, place a black oil cloth bag in the back end of his coupe and close the lid. The agents testified that from the appearance of the bag it contained a bottle or a jug, and that they could see glass through a worn part of the bag. The defendant drove his automobile into an alley. The agents followed, searched the back end of the car and found liquor. They had no warrant. The court held that the search was illegal. The syllabus reads as follows:

> "1. Information that defendant was delivering tax unpaid liquor and sight of defendant coming out of house and placing in automobile black bag through worn part of which officers could see glass, *held not to show probable cause that tax unpaid liquor was being transported* or concealed nor to justify arrest of defendant without warrant and seizure of automobile and liquor found therein.
>
> 2. To make arrests, searches and seizures without warrant, there must be probable cause of transportation or possession of liquor on which tax is unpaid."

The court in its opinion, on page 294, says:

> "It must be remembered that, to make arrests, search and seizures without warrants since the repeal of the 18th Amendment, there must be probable cause not only of the transportation or possession of liquor, *but of liquor on which the tax is paid,* since it is not unlawful to transport or possess tax paid liquor. The cases decided during the prohibition era, and which are cited by the government, must therefore be viewed in this light."

In the case of *United States vs. Kind*, 87 Fed. (2nd) 315, the indictment charged the defendant with unlawfully possessing liquor without tax stamps, under Section 1152A, United States Code. The facts adduced showed that on April 18, 1936, agents of the Government went to a garage which was rented by the defendant Kind, looked through the window and saw a number of five-gallon cans wrapped in paper and three-gallon cans "usually used in transporting Belgian alcohol." The doors were locked and therefore an agent remained at the premises until the next morning when the appellant drove up in an automobile and opened the garage. The agent then testified that he detected the odor of liquor. The agents thereupon *entered the garage,* announced that they were Federal officers, arrested the defendant, *searched his car* and found in the car two bottles of liquor not containing stamps. The cans and the bottles were both seized.

The agents also testified that an investigator in the district had advised them that the particular automobile searched had been used in transporting alcohol, both Belgian and domestic, and that the defendant had been seen making deliveries of alcohol to various stores. The agents at no time had a search warrant. The lower court overruled a motion to suppress the evidence, and this judgment was reversed by the Circuit Court of Appeals, which held that the motion to suppress should have been granted.

The syllabus of that case reads as follows:

"1. *Searches and seizures*

Search of garage and seizure of alcohol in unstamped containers without warrant *after seeing accused drive automobile into garage* held unlawful where federal agents acted upon mere tip from unknown source, and because of smell of alcohol on outside of garage, and had opportunity to obtain warrant. (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)

"2. *Criminal law*

Alcohol in unstamped containers seized in garage leased by accused, in an unlawful search and seizure, held improperly received in evidence, in prosecution for possessing alcohol in unstamped containers. (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)

"3. *Searches and seizures.*

Search of garage and seizure of alcohol in unstamped containers found therein without warrant after receiving tip from unknown source, and noticing alcohol odor on outside of garage, and seeing accused drive automobile into garage could not be justified as incident of lawful arrest, since there *was no probable cause to believe that crime of possessing alcohol in unstamped containers was being committed in presence of officers.* (Liquor Taxing Act of 1934, 201, 26 U. S. C. A. 1152A; Const. Amend. 4.)"

The Court in its opinion says:

"Nor can the search be justified as an incident of a lawful arrest. See *Angello v. U. S., supra; U. S. v. Lee, supra.* The entry of the garage having been made without a search warrant and without probable cause, 'the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict' the appellant. *Taylor v. U. S. supra,* 286 U. S. 1, at page 5, 52 S. Ct. 466, 467, 76 L. Ed. 951. The smell of alcohol alone did not strip the tenant of the garage of his constitutional guarantee against unreasonable search. In the absence of probable cause to believe that the crime—*that of possessing alcohol in unstamped containers*—was being committed in the presence of the officers, there was no basis for a lawful arrest, and consequently no right of search and seizure.

"Judgment reversed."

In the case at bar, the officers had far less justification for the search and seizure made. The agents in the case

at bar did not know that the defendant had liquor in his possession *without tax stamps,* did not see defendant make deliveries, nor did they smell alcohol. The entire search was based on the alleged tip. The agents acting on this alleged tip, thereupon proceeded with the search and seizure of the garage at the defendant's home,—this in direct violation of the defendant's constitutional rights.

During the prohibition era, the courts uniformly held, as may be seen from the cases cited herein, that a search warrant could not be issued nor a search without warrant be made of a private dwelling unless based on such facts that would lead a man of reasonable prudence and caution to believe an offense had been committed. That was the rule during the period when the mere possession of any kind of intoxicating liquor was unlawful.

Now, under the Internal Revenue Laws, the possession of liquor in itself is not unlawful—it is unlawful to possess or transport *"tax unpaid liquor,"* and then only, provided that the liquor is intended for sale or for the use in the manufacture of articles intended for sale.

It is, therefore, our contention that to constitute probable cause warranting the search of a private dwelling without a warrant, the facts upon which the search is based must be such as to impart to the agent a reasonable belief, such as a reasonably prudent and cautious man would believe, that *tax unpaid liquor* was in the possession of and was being transported by the accused and that said *tax unpaid liquor* was intended for sale or for the manufacture of articles intended for sale. *The mere possession of liquor is no longer an offense.*

In the case at bar, the facts upon which the search without warrant of the defendant's garage, a private dwelling, was based, are testified to by the Government agent, Sidney M. Bowes (Record, 24), in the hearing on the motion to suppress the evidence. The information upon which

the Government agents relied was that a certain Dodge automobile would transport "phoney whiskey" from a certain address at a certain time. There was no information which would lead a reasonably cautious and prudent man to believe that the so-called "phoney whiskey" was tax unpaid liquor, nor that it was intended for sale or for the use in the manufacture of articles intended for sale.

It is highly conceivable and highly probable that "phoney whiskey" might still have tax stamps thereon. To say that the use of the phrase "phoney whiskey" would impart such information to an agent and give him probable cause so as to authorize him to violate the sanctity of a man's private dwelling without even a search warrant would be to go farther and to stretch beyond recognition the principles laid down by our Constitution to protect the privacy of a man's home.

In the case of *U. S. vs. Blich*, 45 Fed. (2nd) 627, the court held that where agents had been informed by a reliable person, whom they believed, that transportation was to take place at a certain date and place and where the defendant had previously been convicted for violating liquor ordinances, that this was insufficient to constitute probable cause for the search of an automobile without a warrant. Syllabus 3 of that case reads as follows:

> "3. Probable cause for search of an automobile for liquor transportation without warrant should be such as might be established in competent tribunal as basis for warrant."

In the case at bar, the search is not merely that of an automobile, *but is a search of a garage in which the automobile was located.*

It is conceded that the automobile was in the garage, and the defendant was walking away from the automobile at the time of the search. This is not a case where an automobile is stopped and searched on the highway. It

is a case where private premises were invaded, and in the process of this invasion, an automobile is searched, in the garage, and within the curtilage of the private premises. This case is comparable to one where a package is located in a garage, the garage is invaded and the package broken open and searched. The automobile, like the package, was within the garage and the garage was invaded by the officers without probable cause and without any search warrant whatsoever.

At the time the officers entered upon the premises of the defendant they had absolutely no cause to believe that the defendant was transporting *tax unpaid liquor* intended for resale. Their justification for this trespass is based on facts which are not sufficient to lead a reasonably discreet and prudent man to believe that *tax unpaid liquor* which was intended for resale was illegally in defendant's automobile.

The officers claim probable cause based on information obtained from an informant, whom they refused to disclose, but whom they believed to be reliable. They saw the defendant early in the evening leave the house at 10838 Drexel Avenue with three women. Subsequently the defendant returned to the home around midnight. They heard a rustling of heavy paper against a hard surface. Then they saw the defendant leave the premises at 10838 Drexel Avenue and proceed to East 105th Street. *The driver of the car was not in any hurry nor did he appear to be running away.* In fact, the agent, Sidney M. Bowes, testified that his movements after he left 10838 Drexel Avenue were not suspicious.

The court held these facts sufficient to constitute probable cause permitting the agents to invade the sanctity of the defendant's home, to go into his garage, to forcibly break open the trunk compartment of the defendant's automobile and search this automobile.

It will certainly be conceded that the agent could, by no stretch of the imagination, have obtained a search warrant, and, therefore, could not make such search without warrant.

If the facts within the knowledge of the Government agents could not justify the issuance of a search warrant, those same facts could not justify the search of the automobile in the garage of the defendant's home.

Furthermore, the officers could have obtained a warrant to search the defendant's automobile if they believed they had reasonable and probable cause so to do, after the automobile had been placed in the defendant's garage. It would be a simple matter to have one of the agents obtain the search warrant while the other watch the premises to see that the automobile did not leave.

In the case of *United States vs. Kaplan*, 89 Fed. (2nd) 869, the Court on page 871 of its opinion says:

> "We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportion in the residential part of Brooklyn. Perhaps so; any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in *Taylor vs. United States*—might then have been valid. It takes time to break up a still and take the parts away; if the attempt was made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or a commissioner, whose action would at least have put a different face upon their subsequent proceedings."

According to the testimony of the agents, they knew many hours prior to the arrest and seizure that that certain Dodge car would transport the "phoney whiskey."

Surely in all those hours, one agent could have gone to the judge or commissioner and obtained a search warrant if they thought the evidence sufficient.

We therefore contend that the invasion of the defendant's garage was a direct violation of the defendant's rights as guaranteed to him by the Constitution of the United States and by the Constitution of Ohio.

## 2. The Garage that was Searched was that of a Private Dwelling.

It is contended that the search of the garage in which the defendant's automobile was parked at the time of the search and seizure of the evidence herein, is part of the private dwelling occupied by the defendant since it is within the curtilage, and that, therefore, the search made in this matter was a search of a private dwelling.

The Fourth Amendment of the Constitution of the United States reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the placed to be searched, and the persons or things to be seized."

The provisions of this article of the Constitution and the Ohio Constitution, Article 1, Section 14, are substantially a recitation of what was a part of the common law and is intended to protect every citizen against unreasonable encroachment upon the sanctity and privacy of his private dwelling.

In the case of *United States vs. Slusser*, 270 Fed., 818, it was held that a garage close to the dwelling was a part of the home.

In the case of *Temperani vs. United States*, 299 Fed., 365, the court went into the question as to whether or not the term "private dwelling" as used in the National Prohibition Act is synonymous with the words "dwelling house" as handed down to us in earlier decisions. In that case a garage underneath a dwelling house had been searched. A motion was made to suppress the evidence because of an unlawful search. The court said (quoting from *Bare vs. Com.*, 122 Va. 783; 94 S. E. 168):

> "We know of no analogy in the law for the construction of this language except such as is found in the common and statute law referring to arson, burglary, and the homicide and assault cases, where the prisoner claims to have committed the alleged crime in self-defense after having retreated to his castle or his home. As construed by the courts from the earliest to the latest times the words 'dwelling' or 'dwelling house' have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises generally described as 'within the curtilage.'
>
> This rule is supported by Hale, Blackstone, Greenleaf, Bishop, and all the text writers. Within this definition the garage comes clearly within the protection of the Constitution."

See also *People vs. Taylor*, 2 Mich. 250; *Forni vs. United States*, 3 Fed. (2nd) 354; *Guaresimo vs. U. S.*, 13 Fed. (2nd) 848; 12 A. L. R., 1179; *U. S. vs. Palma*, 295 Fed., 149.

In the case of *Taylor vs. U. S.*, 286 U. S. 1, 76 L. Ed. 951, the agents searched a garage without a warrant, found and seized liquor. Their suspicion was based on information that the defendant was violating the Prohibition Law. This suspicion was confirmed by the agents through their senses, in that they smelled the odor of liquor, and was confirmed by peeping through a chink in the garage which

stood adjacent to the defendant's dwelling house. The court held that under those facts the officers were not justified in breaking into the garage and seizing the liquor in order to obtain evidence to establish the guilt of the defendant. The syllabus reads as follows:

> "2. Suspicion that a person engaged in violations of the prohibition law, confirmed by the odor of whiskey and by peeping through a chink in a garage standing adjacent to his dwelling, and part of the same premises, will not justify prohibition officers in breaking into the garage and seizing the whiskey for the purpose of obtaining evidence of guilt."

Justice McReynolds delivered the opinion of the court. Quoting from the opinion on page five:

> "During the night of November 19, 1930, a squad of prohibition agents, while returning to Baltimore City, discussed premises No. 100 Curtiss Avenue, of which there had been complaints 'over a period of about a year.' Having decided to investigate they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building—is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are parts of the same premises.
>
> As the agents approached the garage they got the odor of whiskey coming from within. Aided by a searchlight they looked through a small opening and saw many cardboard cases which they thought probably contained jars of liquor. Thereupon they broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken upon the hope of obtaining evidence upon which to indict and convict him. We think the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. Prohibi-

tion officers may rely on a distinctive odor as a physical fact indicative of possible crime, but its presence alone does not strip the owner of the building of his constitutional guarantee against unreasonable search."

In the case of *Wakkuri vs. U. S. of America,* 67 Fed. (2nd), 844, decided by the Circuit Court of Appeals for the 6th Circuit on December 11, 1933, the court held that a bathhouse adjacent to a dwelling house on a small farm was within the curtilage of the home and within the protection of the Constitution against unreasonable searches and seizures.

In the case of *U. S. vs. Raho,* 10 Fed. Supp. 660, the syllabus reads as follows:

"Officers seeing smoke from chimney of shanty near restaurant, and smelling odor of mash or alcohol but not seeing commission of crime until they entered premises and opened door of shanty held not justified in searching property without warrant."

The Court in its opinion states the garage was not searched. We respectfully submit that such a statement is fallacious in view of the facts in this case.

The evidence was that the search of the automobile was made after the defendant had driven his car into the garage located on the premises of the defendant's residence.

While the automobile was the object that was searched, the search without a doubt was made *in the garage* of the defendant, and *therefore was a search of the garage itself.*

If instead of the automobile in a garage, the search had been made of the *drawers of a dresser located in the home of the defendant,* clearly it could not be said that the search was not made of the defendant's home.

The Court's position that the garage was not searched is clearly erroneous.

We, therefore, contend that the garage, which was searched by the officers without a search warrant, was part of the curtilage of the defendant's private dwelling, and, therefore, the search made was that of a private dwelling.

**B. CONFIDENTIAL INFORMER.**

The Court of Appeals held that by reasons of public policy the identity of the confidential informer need not be disclosed.

The Trial Court sustained objections and the following questions were presented by the defendant relating to the confidential informer.

(a) "Q. Did you receive any information which you considered reliable concerning his action in Charleston, West Virginia?

Mr. Scott: I object, your Honor.
The Court: Objection sustained.
Mr. Doyle: Exception.

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: Exception."

(Page 29, Record.)

(b) "Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. Scott: I object.
The Court: Objection sustained.
Mr. Doyle: May I be heard on that?
The Court: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I shall not re-examine the

question. I have examined it again within the last 48 hours.

Mr. Doyle: May I dictate my offer?

The Court: Certainly.

Mr. Doyle: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable."

(Pages 34 and 35, Record.)

(c) "Q. What was the reason for your going out there in this vicinity?

A. I received reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418—

Mr. Doyle: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The Court: You may save the point.

Mr. Doyle: Exception."

(Page 28, Record.)

It was the intention of the defendant by this line of questioning to determine the name of the confidential informer upon whose information the Government agents claimed to rely. The defendant had an absolute right to know the name of the confidential informer; first, so that the Court might determine whether or not the officers had reasonable cause to believe this informer, and secondly, so that the defendant might, if possible, impeach the testimony of the Government's witnesses.

One of the facts, upon which the agents based their search of the defendant's premises without a warrant, was that they had been informed that a certain automobile of a

certain license number would transport liquor at a certain time. This information was obtained by the agents from one whom the agents called a "confidential informer," and upon whose information they relied. The court, however, refused to allow the counsel for defendant to cross examine the Government witnesses as to the name of the confidential informer, nor did the court permit counsel for defendant to show by this testimony that the judgment of the Government agent as to whether or not the information received by him was reliable, had been proved faulty at a former trial of this matter.

If the defendant had been permitted to obtain an answer to this question, the testimony, as indicated by the proffer of testimony, would have been that, at the previous trial of this matter, the witness had introduced evidence which he deemed reliable which was later, after investigation by the Attorney General of the United States, proven to be false, perjurious and unreliable.

The evidence would have shown that after a former conviction of this defendant based on this same indictment, an investigation of the charges of the defendant that the testimony which the officers deemed reliable was unreliable, false and perjurious, the Government confessed error in the Court of Appeals, upon which confession of error, the cause was reversed and remanded and the present trial had.

In the case of *U. S. vs. Blich,* 45 Fed. (2nd) 627, the agents had been informed by a reliable person, whom they believed, that the defendant who had previously been convicted of violating liquor ordinances, would transport liquor at a certain place and date. The agents, however, refused to state the name of their informant. The court held that the agents should be required to give the name of the informant. The syllabus of that case reads as follows:

"4. Officers making searches and seizures for transportation of liquor, on public highway, without warrant *must, to establish probable cause, disclose every element making up case.* (The rule reasonably includes the *source* of their information, *so that the court may determine whether,* under all the circumstances, *a case of probable cause has been established,* and perhaps as well to restrict informers to sincerity of purpose.)"

Thus, in the case at bar, the defendant was entitled to know the name of the confidential informer and the source of the information allegedly obtained by the Government agent *so that the court might determine whether a case of probable cause had been established.*

In Cornelius on *"Search and Seizure"* at page 124, par. 41, it is said:

"Information furnished by another that an offense has been committed may or may not constitute probable cause justifying arrest without warrant, the sound rule being that the information relied upon must be such as will justify a reasonably prudent man in believing that the particular person arrested was guilty of felony.

Again we find that general principles aid us but little in determining what constitutes probable cause but an examination of the cases cited in (1) and (2) to note 42 indicates the rule that the information imparted should be by some person who has actually observed such facts as would constitute probable cause to believe the offenses had been committed."

See also *People vs. Miller,* 245 Mich. 115, 222 N. W. 151.

The agents could not have searched the premises and automobile of the defendant without a warrant unless they had probable cause to do so. Under the authorities cited herein probable cause must be based on facts such as would lead a reasonably cautious and prudent man to believe that

tax unpaid liquor was being transported. It is therefore our contention that the defendant was entitled to know the source of the agents' information so that the court might determine whether or not a case of probable cause had been established.

It would be a gross miscarriage of law to place entirely in the hands of the agents the right to adjudicate whether or not they had probable cause to search private dwellings, by giving them the sole right to determine the reliability of their information.

It is a great injustice to permit them to keep concealed the source of their information, so that their testimony can not be refuted. Whether the information was true or false, reliable or unreliable, the citizen whose premises are searched without warrant must submit to and is bound by the opinion of the agents that their information was reliable.

To so hold would be a violation not only of the terms and purposes of the 4th Amendment of the Constitution, but would be contrary to the principles enunciated by our courts throughout the years. It would permit any officer upon any justification that he deemed sufficient to invade the sanctity and privacy of a man's home and to subject those premises to a search without a warrant. This clearly is not and cannot be the law.

Furthermore, under the rules of evidence, a witness should be required to answer such questions as are material to the issue in order to give the defendant an opportunity to impeach the testimony of the witnesses or to investigate the truth thereof. The names of the informant upon whom the agents relied is, certainly, material to the issue of probable cause.

The Court refused to strike from the testimony the statement made by the Government witness that he had received reliable information from the confidential in-

former. (Record, 28.) This information was purely hearsay and was not a statement made in the presence of the defendant. Under these circumstances, the Court, by its ruling, denied to the defendant his constitutional right to face his accusers and to answer the charges allegedly made against him by the so-called reliable informer.

We therefore contend, that since the search without a warrant in the case at bar was based on information obtained from a "confidential informer," that the defendant and the Court were entitled to know the name of that informer and all the circumstances, so that the Court could determine whether or not the information was given by a reliable informant.

We therefore contend, that the court below erred in sustaining the objection to the question as to the name of the confidential informer.

**C. MOTION FOR NEW TRIAL.**

We submit that the Court of Appeals erred in not reversing and remanding this case for failure of the Trial Court to grant defendant's motion for new trial based on the specifications of error hereinabove disclosed. For the foregoing reasons, it is respectfully submitted that the judgment of the Trial Court and its affirmance of said judgment by the Court of Appeals should be reversed and a new trial be awarded by this Court.

A. L. GREENSPUN,
*Attorney for Petitioner.*

GERALD A. DOYLE,
*Of Counsel.*

## APPENDIX A.

### Opinion of the United States Circuit Court of Appeals.

No. 7773.

UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT.

HYMAN SCHER, alias WILLIAM SCHER,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

Decided February 18, 1938.

Before Moorman and Allen, Circuit Judges, and Nevin, District Judge.

*Per Curiam.* The appellant was found guilty under two counts of an indictment charging him with unlawful possession and transportation of distilled spirits, the containers of which did not have revenue stamps affixed thereto. The offenses charged were violations of Section 1152a, Title 26, U. S. C.

Investigators of the Alcohol Tax Unit at Cleveland, Ohio, received confidential information from a source previously proved to be reliable that a load of tax-unpaid distilled spirits in bottles would be taken from a given address in a certain car, the make, model, and license number of

which were given, at about midnight of December 30, 1935. The investigators saw appellant call at the designated address in a car of the specified make, model and license number, at about nine P. M., and leave about ten-thirty, carrying a package and accompanied by three women. The car returned about midnight. It was parked without lights in the driveway at the rear corner of the house for about half an hour. From the opposite side of the street the investigators heard the rear door of the house open, and several times heard the sound of heavy paper being scraped across a hard surface, after which they heard two doors slam. Appellant then drove the car, which appeared to be heavily loaded, to his residence. He drove into the garage, and was in the act of getting out of the car when one of the investigators approached with a flashlight, and asked if the car was hauling bootleg whiskey. Appellant said it was for a party, and in reply to the question as to whether it was tax paid, said that it was "Canadian whiskey," and that it was in the trunk of the car. In the car eighty-eight bottles without tax stamps were found in fourteen packages similar to that which appellant had previously carried from the premises under observation.

Appellant's principal contentions are (1) that the court erred in denying appellant the right to cross-examine as to the identity of the informant, and (2) in overruling appellant's motion to suppress the evidence.

As to the first contention, for reasons of public policy the identity of a confidential informant must be kept secret, and such sources need not be disclosed. *Segurola v. United States,* 16 Fed. (2d) 563 (C. C. A. 1); *Vogel, Extr., v. Gruaz,* 110 U. S. 311; *Shore v. United States,* 49 Fed. (2d) 519 (C. A. D. C.); *McInes v. United States,* 62 Fed. (2d) 180 (C. C. A. 9); *Wilson v. United States,* 65 Fed. (2d) 621 (C. C. A. 3); *Goetz v. United States,* 39 Fed. (2d) 903 (C. C. A. 5).

As to the second contention, appellant moved to suppress evidence obtained as a result of the search, on the ground that the search was without a warrant or without probable cause, and in violation of Section 14, Article 1, of the Constitution of Ohio, and the Fourth and Fifth Amendments to the Constitution of the United States. The District Court overruled this motion, and its action was correct. The garage was not searched. Appellant did not oppose the search of the car. The circumstances presented facts within the personal knowledge of the agents, sufficient to lead a reasonably discreet and prudent man to believe that liquor was illegally possessed in the automobile. There was no unlawful search and seizure. *Husty v. United States*, 282 U. S. 694; *Carroll v. United States*, 267 U. S. 132, 149; *Wisniewsky v. United States*, 47 Fed. (2d) 825 (C. C. A. 6); *Ferracane v. United States*, 47 Fed. (2d) 677 (C. C. A. 7). *United States v. Kind*, 87 Fed. (2d) 315 (C. C. A. 2) is distinguishable upon the facts.

The judgment is affirmed.

Judge Moorman took no part in the decision of this case.

## APPENDIX B.

### Order of United States Circuit Court of Appeals Amending Opinion.

No. 7773.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Sixth Circuit.

Hyman Scher

v.

United States of America.

Before: Hicks, Allen and Nevin, *JJ.*

It is ordered that the opinion in the above case be amended by striking out of the next to last paragraph thereof the following sentence: "Appellant did not oppose the search of the car."

Florence E. Allen,
*U. S. Circuit Judge.*

Filed: April 13, 1938.

# INDEX



## CITATIONS

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1937

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No. 1043

HYMAN SCHER, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The trial court's memorandum opinion on the motion to suppress evidence appears at R. 7–9. The *per curiam* opinion of the Circuit Court of Appeals (R. 76–77) is reported at 95 F. (2d) 64.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 18, 1938 (R. 75), and a petition for rehearing denied April 13, 1938. An order amending the opinion was filed on the same day. (R. 89.) The petition for writ of certiorari was filed May 18, 1938. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

(1) Whether the motion to suppress the evidence seized upon a search of petitioner's automobile was properly overruled.

(2) Whether the trial court erred in excluding testimony as to the identity and reliability of the Government's confidential informer.

## STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of an indictment charging, respectively, the possession and transportation in a certain automobile of 24 quarts of gin and 13⅓ gallons of whisky, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed thereon, in violation of the Liquor Taxing Act of 1934 (c. 1, Title II, Sec. 201, 48 Stat. 313, 316; U. S. C., Title 26, Sec. 1152a) (R. 2–3).

Before trial petitioner filed a motion to suppress evidence, which was overruled and an exception noted (R. 4–9, 11). During the course of the trial an Alcohol Tax Unit agent testifying for the Gov-

ernment was asked on cross examination to state the name of his confidential informer and the source of his information. Objections on the part of Government counsel to the questions were sustained and exceptions noted. (R. 34–35, 36.) At the close of the Government's case the petitioner made a motion for a directed verdict, which was overruled and an exception preserved (R. 36–37). It does not appear that the motion was renewed at the end of the whole case. Petitioner was convicted on both counts of the indictment and was sentenced to imprisonment for a year and a day and to pay a fine of $500 and costs (R. 10–11). A motion for a new trial was overruled (R. 12–13).

On appeal to the Circuit Court of Appeals for the Sixth Circuit the judgment was unanimously affirmed (R. 75, 77) and a petition for rehearing denied (R. 89).

At the hearing on the motion to suppress evidence, Alcohol Tax Unit investigator Bowes testified substantially as follows: He and other officers received information, from a source which had theretofore been found reliable, that the so-called Carr-Burke-Rosenthal gang were operating from headquarters at 10838 Drexel Avenue, Cleveland, Ohio; that they were putting out the same kind of "phony" whiskey[1] as they had at 10600 Drexel Avenue; and that at about midnight, on December

[1] "Phony" liquor, according to the agents' later testimony on the trial of the case, meant to them bootleg or tax unpaid liquor (R. 31, 33).

30, 1935, a load of this whiskey would be taken from the above premises, No. 10838 Drexel Avenue, in a Dodge car, License No. LX–418. The agents posted themselves in the premises and at about 9:30 P. M. saw the above described car arrive and remain there about an hour. At the expiration of that time a man resembling the petitioner came from the house, which was a private dwelling, accompanied by three women, all of whom entered the car and drove away. The man had a package in his hand of the same size and shape as those later seized containing whiskey. The car returned about midnight. Previously it had parked in the street. This time it stopped at the rear of the house near the door which led into the basement. The headlights were turned off and it remained about half an hour. It was agreed at the hearing that Agent Williamson, who was stationed near the premises at the time in question, would testify, if present, as follows: "I heard something heavy set down, like wood, and heard it slide, like it was heavy paper, across a wooden surface, and I heard the house door slam, the trunk slam, and the door of the car slam." The cases of liquor later seized, six bottles to the case, were wrapped in very heavy brown wrapping paper with at least two wrappings and with heavy cord around them crosswise so that they could readily be picked up. The car left about 12:30 with the petitioner the only passenger. It appeared to the agents to be loaded more heavily than on the previous trip with the driver and the

three women in it. The agents followed the car two or three blocks when it stopped for gasoline. It then proceeded two or three blocks more, with the agents following, and as they were about to close up on it the car turned into a driveway at 10025 Olivet Avenue, which later proved to be petitioner's home. Agent Bowes left the Government car as soon as it could be stopped and followed the bootleg car into the garage. The headlights were still on and petitioner had just alighted from the car and walked to the back door of the garage. The agent said, "I am a Federal officer, I have a tip that this car is hauling bootleg liquor." The petitioner said, "Just a little for a party." The agent said, "Is it tax paid?" Petitioner replied, "It is Canadian whiskey." The agent said, "Is it in there?" and petitioner said, "It is." The agent then opened the trunk on the rear of the car and found 14 packages, totaling 88 bottles, of untaxpaid liquor, two bottles being found next to the driver's seat. Petitioner was placed under arrest and the car and liquor were seized. (R. 24–27.)

ARGUMENT

1. Petitioner contends, first, that his motion for a suppression of evidence should have been sustained, because there was no probable cause for the search and seizure, and that the admission of the evidence obtained as a result thereof deprived him of his rights under the Fourth and Fifth Amendments. He especially contends that the agents had

no cause to believe that the liquor transported and possessed was tax unpaid liquor; that the search of the automobile constituted a search of the garage and that, since the garage was within the curtilage of petitioner's home, it could not be searched without a search warrant. We submit that the contentions are without merit.

The agents had confidential and reliable information that a certain named bootleg gang formerly operating at another address in Cleveland, Ohio, were putting out tax unpaid liquor at 10838 Drexel Avenue and that a Dodge car, License No. LX-418, would call at these premises at about midnight on December 30, 1935, to take away a load of this liquor. The car described by the informant appeared at the place and at the time given, drew up to the rear door and the lights were turned off. There was the sound of the rustling of papers against a hard surface, the sound of heavy objects being set down on a hard surface, followed by the slamming of a heavy door and the closing of the house door. The agents earlier that evening had seen a package wrapped in paper taken by the petitioner from the premises in the same car. When the agents followed the car upon leaving the premises after midnight, they noticed that it was heavier loaded with one person in it than it was earlier in the evening when it contained four passengers. As the agents were closing in on petitioner's car, he swerved into a private driveway and into a garage. He was immediately followed by one of the agents

and when questioned as to whether he was hauling bootleg liquor, he replied, "Just a little for a party." When asked whether it was taxpaid, he made the evasive answer that it was Canadian whiskey. These responses, together with the agents' prior information from a reliable source that the place from which the car left was operated by a bootleg gang and that this particular car would be there for a load of liquor at the time it did arrive; the most suspicious circumstances of time, place, and method under which the car was loaded, and the fact that it carried a heavy load, all were sufficient, we submit, to lead a reasonably prudent and cautious officer to believe that the car which he was about to search contained tax-unpaid liquor.

No part of the garage or premises was searched. The only thing searched was the automobile which the agents had followed continuously from the place where the contraband was obtained. As they were about to stop the car, it drove off the street into a garage with the officer following on foot. The door of the garage was open. Petitioner had just alighted from the car and met the agent at the door. The pursuit on the street and the search were one continuous and uninterrupted process. There was no intent or purpose on the part of the agents to search the garage or private dwelling and no such search was made. It cannot be sucessfully contended that an automobile which the officers had reasonable cause to believe was carrying contraband and which they were about to search could

secure immunity by being run into a private garage. A garage has not become the altar of a medieval church which can afford immunity to a malefactor who manages to reach it. Even if it be conceded that the search without a warrant of an automobile in a garage adjacent to a private dwelling is prima facie unlawful, we submit that under the facts and circumstances of this case the officers could reasonably conclude that a crime was being committed in their presence which would justify an arrest and search and seizure without a warrant.

The decision of the court below upholding the search and seizure is supported by the following cases: *Husty* v. *United States*, 282 U. S. 694, 700–701; *Carroll* v. *United States*, 267 U. S. 132, 153, 155–162; *Wisniewski* v. *United States*, 47 F. (2d) 825 (C. C. A. 6th); *Ferracane* v. *United States*, 47 F. (2d) 677 (C. C. A. 7th); *Rodriguez* v. *United States*, 80 F. (2d) 646 (C. C. A. 5th).

The cases relied on by petitioner to show a conflict may be distinguished on their facts and are not applicable here. They relate to the search of automobiles without probable cause or to the search of garages or private dwellings without search warrants. Petitioner relies especially, as he did in the courts below, on *United States* v. *Kind*, 87 F. (2d) 315 (C. C. A. 2d). While the facts in that case are somewhat similar to those in the instant case, the trial court, in its memorandum opinion (R. 7–9) reconsidered the validity of the search and seizure in the light of the *Kind* case and pointed out dis-

tinctive differences in the facts in the two cases which show that they are not in direct conflict.

2. Petitioner next contends that the trial court erred in not permitting him to cross examine the Government's witnesses with respect to the identity of the confidential informer and the source of their information so that the court might determine whether or not the witnesses had reasonable cause to believe this information and whether the information was reliable. He further claims that he was entitled to know the identity of the informer so that he might, if possible, impeach the testimony of the Government witnesses.[3]

We submit that petitioner's contentions are foreclosed by the overwhelming weight of authority, which is to the effect that for reasons of public policy the sources of confidential information given to Government officers must be kept secret and need not be disclosed. *Segurola* v. *United States,* 16 F. (2d) 563, 565 (C. C. A. 1st), affirmed on other grounds, 275 U. S. 106; *Shore* v. *United States,* 49 F. (2d) 519, 522–523 (App. D. C.), certiorari

[3] The confession of error filed by the Government in the Circuit Court of Appeals upon petitioner's former appeal, to which he refers in his brief (p. 35), was predicated, the Department files indicate, upon certain testimony by agents concerning petitioner's supposed activities in West Virginia, which was based upon information which proved to be erroneous. These agents did not testify at the second trial of the petitioner and there is nothing in the record or Department files which discloses that the information which resulted in the search of the petitioner's car came from the same informer.

denied, 283 U. S. 865; 285 U. S. 552; *Malnes* v. *United States*, 62 F. (2d) 180 (C. C. A. 9th); *Wilson* v. *United States*, 65 F. (2d) 621, 624 (C C A. 3d); *Goetz* v. *United States*, 39 F. (2d) 903 (C. C. A. 5th); cf. *Vogel* v. *Gruaz*, 110 U. S. 311, 316.

The only case cited to the contrary by petitioner is *United States* v. *Blich*, 45 F. (2d) 627, decided in 1930 by the District Court for the District of Wyoming. While three of the above cases were decided before the *Blich* case, namely, the *Segurola*, *Goetz* and *Vogel* cases, it appears from the court's opinion in the *Blich* case (p. 629) that none of these was called to its attention. The conflict with the District Court decision in the *Blich* case is, of course, one not requiring the issuance of a writ of certiorari.

CONCLUSION

The case was correctly decided below and no adequate reason is presented why it should be further reviewed by this Court. We therefore respectfully submit that the petition for writ of certiorari should be denied.

ROBERT H. JACKSON,
*Solicitor General.*
HUGH A. FISHER,
*Acting Head, Criminal Division.*
MAHLON D. KIEFER,
W. MARVIN SMITH,
*Attorneys.*

MAY, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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# In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 49

HYMAN SCHER, ALIAS WILLIAM SCHER, PETITIONER

*v.*

THE UNITED STATES

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The memorandum opinion of the trial court on the motion to suppress evidence appears at R. 7–9. The per curiam opinion of the Circuit Court of Appeals (R. 75–77) is reported at 95 F. (2d) 64.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 18, 1938 (R. 75),[1] and a

[1] It should be observed that the notice of appeal contained in the transcript relates to the judgment rendered by the District Court at a prior trial and not to its judgment in the present case (R. 13). However, this was apparently an error in making up the transcript, and the Government has not and does not now raise any objection based on this situation.

petition for rehearing denied on April 13, 1938 (R. 77). An order amending the opinion was filed on the same day (R. 77). The petition for a writ of certiorari was filed on May 18, 1938, and granted on May 31, 1938 (R. 78). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

## QUESTIONS PRESENTED

(1) Whether the search of the petitioner's automobile and the seizure of the non-tax paid liquor contained therein was illegal under the circumstances of this case, and whether his motion to suppress the evidence thus obtained was properly overruled.

(2) Whether the trial court properly sustained the objection of the Government to the question addressed to a law enforcement officer on cross-examination requiring him to reveal the name of his confidential informer.

## STATUTE INVOLVED

Section 201, Title II, of the Liquor Taxing Act of January 11, 1934, c. 1, 48 Stat. 313, 316 (U. S. C., Title 26, Sec. 1152a), provides, in part, as follows:

> No person shall * * *. transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the

quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

* * * * *

(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; * * *.

Section 207, Title II, of the Liquor Taxing Act of 1934, c. 1, 48 Stat. 317 (U. S. C., Title 26, Sec. 1152 g, so far as pertinent, provides:

Any person who violates any provision of this title, * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts charging him, respectively, with "knowingly,[2] wilfully, feloniously, and unlawfully" possessing and transporting in a certain automobile 24 quarts of gin and 13⅓ gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed thereon, in violation of the Liquor Taxing Act of 1934, *supra* (R. 2–3).

[2] In charging that the petitioner "knowingly" possessed and transported the liquor in question, the indictment went farther than the specific language of the statute, the word "knowingly" not being contained therein.

Before trial petitioner filed a motion to suppress evidence obtained by a search of his automobile and the seizure of the liquor found therein, claiming that the search and seizure were illegal (R. 4–7). This motion sought also a return of all articles seized as a result of the search. The motion was overruled by the District Court and an exception was noted (R. 7–9, 11, 27). The case then proceeded to trial (R. 27). The motion to suppress evidence was not renewed at the trial nor was any objection interposed to the introduction of testimony relating to the search and seizure on the ground that they were illegal. At the close of the Government's case the petitioner made a motion for a directed verdict, which was overruled. An exception was preserved (R. 36–37). This motion was not renewed at the end of the whole case (R. 51). Petitioner was convicted on both counts (R. 10–11, 58) and sentenced to imprisonment for a year and a day and a fine of $500 and costs (R. 11). A motion for a new trial was overruled (R. 12–13).

The judgment was affirmed by the Circuit Court of Appeals for the Sixth Circuit in a per curiam opinion and a petition for rehearing denied (R. 75–77).

At the hearing on the motion to suppress evidence the petitioner testified in support of his application (R. 19–24). The petitioner then called Investigator Bowes of the Alcohol Tax Unit as his witness (R. 24–27). In order to give a better picture

of the chronology of events, Investigator Bowes' testimony will be summarized first. It was substantially as follows:

He and other officers received information, from a source which had theretofore been found reliable, that the so-called Carr-Burke-Rosenthal gang was operating from headquarters at 10838 Drexel Avenue, Cleveland, Ohio; that it was "putting out" the same kind of "phony" whiskey as it had elsewhere;[3] and that about midnight on December 30, 1935, a load of this whiskey would be taken from the above premises in a Dodge car, license No. LX 418.[4] The officers posted themselves "in" (apparently near) the premises, which comprised a private dwelling, and at about 9:30 p. m. observed the arrival of the above-mentioned car. It remained there about an hour, when a man resembling the petitioner, accompanied by three women, came out of the house. The man carried a package of the same size and shape as those which were later seized and contained whiskey. They entered

[3] From the testimony of Alcohol Tax Unit Investigator Williamson at the trial, who appears to have been the first to receive the information, it is not clear whether he was advised that the liquor was "phony" or "tax unpaid," but in either event it is clear that he understood that the internal revenue taxes had not been paid on the liquor (R. 31).

[4] No attempt was made by the petitioner in any way to question the reliability of the information upon which the officers acted, at the hearing on the motion to suppress evidence. Indeed, this information was brought out by the petitioner himself in making the officer his own witness.

the car and drove away. The car returned at about midnight. While previously it had been parked in the street, on this occasion it was parked near one of the rear corners of the house, near the door which led to the basement. The headlights were extinguished and the car remained there about half an hour.

It was agreed at the hearing that Officer Williamson, who accompanied Officer Bowes and made some observations not seen nor heard by the latter, would testify, if present, as follows:

> I heard something heavy set down, like wood, and heard it slide, like it was heavy paper, across a wooden surface, and I heard the house door slam, the trunk slam, and the door of the car slam.*

(The cases of liquor later seized contained six bottles to the case, were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted.)

The testimony of Bowes continued to the effect that the car left about 12:30 a. m. with the petitioner as the only occupant. It appeared to be loaded more heavily than on the previous trip, although on that occasion it carried three passengers in addition to the driver. The two officers fol-

* This agreement was made in connection with a further agreement that if Officer Williamson, an investigator of the Alcohol Tax Unit, were present at the hearing, he would give the same testimony as Officer Bowes (R. 26).

lowed the petitioner's car in a Government automobile for two or three blocks, when the former stopped at a gasoline station. The driver alighted, crossed the street and returned with a newspaper. The car then proceeded for two or three blocks, with the officers following. As the latter were "closing up close" the petitioner's car turned into a driveway and was driven into the garage at the petitioner's home at 10025 Olivet Avenue. The officers were unable to stop their car immediately because the streets were slippery. Invsetigator Bowes left the Government car as soon as it could be stopped and followed the petitioner's car on foot to the garage. The garage door was open and the headlights of the petitioner's car were still burning. The petitioner had just alighted and walked to the back door of the garage. The officer, who had his badge and flashlight, said: "I am a Federal officer, I have a tip that this car is hauling bootleg liquor." The petitioner said: "Just a little for a party." The officer asked, "Is it tax paid?" Petitioner replied, "It is Canadian whiskey." The officer asked "Is it in there?" and petitioner said, "It is." The officer then opened the trunk in the rear of the car and found 14 packages, containing 88 bottles of non-tax paid liquor. Two bottles were found near the driver's seat. Petitioner was placed under arrest, and the car and liquor were seized.

At the hearing on the motion, petitioner testifield, among other things, in regard to his arrest

and the search and seizure. He also testified, in effect, that the garage in which his automobile was standing when searched was located about six feet away from the two-family house, the second floor of which was occupied by himself and members of his family; and that the building was not used for any kind of business. He admitted that he bought the liquor in question at the Drexel Avenue address, a private residence, from a man named Carr and paid $145 for it. He stated that he went to the Drexel Avenue house following a conversation had earlier in the day with a stranger who came to the store where the petitioner was employed and told him that he could get liquor there. The stranger called Carr on the telephone and told the latter that he was sending petitioner out. Petitioner first called at the Drexel Avenue house at about 9:30 p. m. and bought one case of liquor which he took to his brother's home. With reference to the seven cases of liquor which he purchased from Carr at midnight, petitioner testified that he could not see whether the liquor was tax-paid because it came in packages and was loaded into his car while he was in Carr's house, and that as to the case opened at his brother's house he paid no attention as to whether the liquor had stamps on it or not. He also testified that he did not have the liquor for sale (R. 19–24).

After the motion to suppress the evidence was overruled, the case came on for trial. The Govern-

ment called Investigator Williamson in addition to Investigator Bowes, who had testified at the hearing on the motion. Williamson's testimony substantially corroborated Bowes, who at the trial repeated, in effect, the testimony he had given at the prior hearing (R. 31 *et seq.*).* They both testified at the trial to the discovery of the liquor in the petitioner's automobile and the surrounding circumstances. No objection to this testimony was interposed by the petitioner on the ground of any alleged illegality of the search. The liquor itself was not offered in evidence.

Petitioner, in testifying at the trial in his own behalf, admitted that he had purchased, possessed and transported the liquor in question (R. 48), but by his own testimony and that of various relatives, attempted to bring the case within the provision of Section 201, Title II, of the Liquor Taxing Act of 1934, which excepts "Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale". He stated that he did not buy the liquor for the last-mentioned purposes (R. 49). He and several members of his family testified that they gave extensive entertainments, at which large quantities of liquor were consumed (R. 37–41, 41–47, 48–49). He

* In testifying as to the 88 bottles of liquor which were seized, Investigator Bowes stated that "There were 36 bottles of those imitation Holland gin in a sort of jug-bottle. * * * I don't recall the exact number. There were some imitation Vat 69 and some imitation of White Horse Scotch whiskey. I believe there were two other types of bottles, the brand names I don't recall." (R. 33.)

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stated that on the evening of the day on which he was arrested (New Year's Eve) there were as many as 75 or 100 people at his home (R. 50). It appeared, however, that he, his father, his mother, his two brothers, his sister and a sister-in-law all lived together and that his drawing account was only $25 to $30 a week (R. 37, 38, 51).

On cross-examination, the petitioner also testified that he did not know that taxes on the liquor in question had not been paid; that he was told that it was Canadian bonded liquor, which to him meant "good" liquor (R. 49-51).

In submitting the case to the jury, the District Judge pointed out that the petitioner admitted and the evidence showed that petitioner possessed and transported the liquor named in the indictment; and that it appeared that the bottles did not bear the stamps required by law. The Judge left two questions for the jury: (1) whether the petitioner knew before the officers searched his car that the bottles were unstamped, and (2) whether he had by a fair preponderance of the evidence established his defense that the liquor was not bought for sale or for use in manufacturing or producing articles intended for sale (R. 52, 55).

Investigator Williamson testified in behalf of the Government at the trial that on December 30, 1935, he saw the petitioner and three women come out of a house on Drexel Avenue, enter a green Dodge sedan and drive away. He continued (R. 28):

> Q. What was the reason for your going out there in this vicinity? A. I received

reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418——

Mr. DOYLE [counsel for petitioner]: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The COURT: You may save the point.[1]

Mr. DOYLE: Exception.

Q. Proceed. A. That a load of tax unpaid distilled spirits in bottles would be taken from this address or would be taken from a house on Drexel Avenue at about 12:30 a. m.

On cross-examination Williamson testified that his confidential information was reliable. He was then asked by defense counsel whether he had received any other information at any time since December 31, 1935, which he considered reliable concerning the petitioner's actions. He replied in the negative. Objections by the Government were then sustained to the following questions by petitioner's counsel (R. 29):

Q. Did you receive any information which you considered reliable concerning his actions in Charleston, West Virginia?

Mr. SCOTT [Govt. counsel]: I object, your Honor.

The COURT: Objection sustained.

Mr. DOYLE: Exception.

[1] This point was not raised by the assignments of error contained in the petition for writ of certiorari (pp. 6–9).

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. SCOTT: I object.

The COURT: Objection sustained.

Mr. DOYLE: Exception.

When Investigator Bowes, who also testified for the Government, was cross-examined by the petitioner's counsel, he testified that he had received confidential information that "phony" liquor would be hauled away from the Drexel Avenue premises in petitioner's car. The following question was then asked by petitioner's counsel and the following colloquy ensued (R. 34–35):

Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. SCOTT: I object.

The COURT: Objection sustained.

Mr. DOYLE: May I be heard on that?

The COURT: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I have examined it again within the last 48 hours.

Mr. DOYLE: May I dictate my offer?

The COURT: Certainly.

Mr. DOYLE: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable at the former trial by pro-

ducing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable.

In concluding his cross-examination of Investigator Williamson, petitioner's counsel brought out that after the first trial of the petitioner on the present indictment the officer further investigated the petitioner's activities and to that end proceeded to Charleston, West Virginia. The officer was then asked, "And did you procure some information which you considered reliable and confidential concerning Scher's activities?", to which an objection by the Government was sustained and an exception noted (R. 36).

## SUMMARY OF ARGUMENT

I. The motion to suppress was properly overruled. (a) The search was of the petitioner's automobile and not of his garage and hence was valid without a search warrant, since it was made on probable cause. Considering the confidential information received by the officers, the verification of this information in numerous particulars by subsequent events, and especially the admissions made by the petitioner at the garage, there were reasonable grounds for the search. The trailing of the car on the street by the officers and the search was one continuous and uninterrupted process.

An automobile which the officers have reasonable cause to believe is carrying contraband and which they have trailed cannot, we submit, secure immunity by being driven into a private garage. (b) Moreover, the search was incidental to or contemporaneous with a lawful arrest and as such was validly made without a warrant. There was sufficient probable cause to justify the arrest, and since the arrest and the search were a part of one continuous transaction, it is immaterial that the search preceded the arrest.

II. The court did not err at the trial in excluding on cross-examination questions designed to elicit the identity of the officers' confidential informer. The rule is that the source of confidential information received by law enforcement officers need not be revealed. Some decisions suggest an exception when a disclosure is necessary either to establish the innocence of a defendant or otherwise to permit the proper disposition of the issues of a particular case. In the instant case the Government is not compelled to rely upon the confidential information to sustain the validity of the search and seizure. There consequently was no occasion for the application of any exception, if one exists, to the general rule. Moreover, the petitioner does not contend that the identity of the informer had any bearing on the question of guilt or upon any issue other than that of probable cause. That issue had been concluded prior to the trial.

## ARGUMENT

### I

### THE SEARCH AND SEIZURE WERE VALID AND HENCE THE MOTION TO SUPPRESS THE EVIDENCE OBTAINED THEREBY WAS PROPERLY OVERRULED

In support of his contention that the motion to suppress should have been granted, petitioner argues that the search and seizure violated his constitutional rights in that the officers did not have probable cause to believe that he possessed and was transporting liquor on which the tax had not been paid. He also contends that the search of the automobile constituted a search of the garage and that, since the garage was within the curtilage of his home, it could not be searched without a warrant. We submit that the contentions are without merit.

It is at least debatable that the petitioner's failure to renew his objection at the trial, is a waiver of his rights. See *Cogen* v. *United States,* 278 U. S. 221, 224. We shall nevertheless present the question on the merits. By so doing, however, we do not wish to be understood as consenting that this defect be overlooked.

#### A. THE SEARCH SHOULD NOT BE DEEMED A SEARCH OF THE DWELLING, BUT OF THE AUTOMOBILE, AND HENCE COULD HAVE BEEN VALIDLY MADE ON PROBABLE CAUSE WITHOUT A SEARCH WARRANT

It is fundamental that the Fourth Amendment does not proscribe all searches and seizures without a search warrant, but only such as (1) are unrea-

sonable, and (2) are directed principally against the home or the person. *Carroll* v. *United States*, 267 U. S. 132, 147; *United States* v. *Lefkowitz*, 285 U. S. 452, 464.*

It is likewise well established that the prohibition against search of a dwelling without a warrant does not include searches of vehicles made upon probable cause. *Carroll* v. *United States*, 267 U. S. 132; *Husty* v. *United States*, 282 U. S. 694; *Rodriguez* v. *United States*, 80 F. (2d) 646 (C. C. A. 5th). Searches of ships, for example, for smuggled goods have always been permitted without a search warrant. Act of July 31, 1789, Sec. 24, c. 5, 1 Stat. 29, 43.

In the case at bar the officers were following the petitioner's automobile. Had they stopped the car and searched it prior to its being driven into the garage, no search warrant would have been requisite since they had probable cause. Upon observing the petitioner's car turn into the driveway leading to his garage, the officers stopped their car and one of them immediately jumped out and followed on foot, without losing sight of the petitioner's vehicle. In other words the search was the continuation and culmination of the action of the

* This Court has indicated that in revenue cases a broader scope will be accorded to the right of search and seizure than in non-revenue cases. *Boyd* v. *United States*, 116 U. S. 616, 623; *Carroll* v. *United States*, 267 U. S. 132, 149. These and other cases also indicate that the constitutional protection is to be strictly enforced to protect a person's private papers from a comprehensive search and seizure but that the rule may be somewhat relaxed when contraband articles are seized. *Weeks* v. *United States*, 232 U. S. 383.

officers in following the car with the evident intent of eventually arresting the occupant. Surely, the petitioner could not cut off the right of search by suddenly driving the automobile into the garage. Substantial rights cannot be made to depend on such minute refinements. Moreover, the archaic forms of the old law of sanctuary constitute no part of the modern law of searches and seizures.

It is clear that the officers had ample probable cause to believe that liquor on which the tax had not been paid was being transported in the petitioner's car. It follows, therefore, that they were justified in making the search.

The testimony of Investigator Bowes, who was called as a witness by the petitioner at the hearing on the motion to suppress, and by whose testimony the petitioner was consequently bound (see, pp. 5–7, *supra*), established that the officers had received confidential information from a source which theretofore they had found reliable that a "bootlegging" gang, which was operating from a private dwelling in Cleveland, Ohio, was selling non-tax-paid liquor at these premises and that a car bearing the license number of petitioner's car would appear at this house at midnight on December 30th for the purpose of taking away a load of such liquor. This information was verified in numerous particulars by subsequent events. The car described by the informant appeared as foretold. It was driven to a rear corner of the house adjacent to the basement door. The lights were turned out. Not long afterward one of the officers heard "something heavy set down, like wood, and heard it slide,

like it was heavy paper, across a wooden surface, and * * * heard the house door slam, the trunk slam, and the door of the car slam." (The cases of liquor later seized were wrapped in heavy paper.) When the officers followed the car they noticed that it was heavier when carrying only one occupant than it had been earlier in the evening when it carried four persons. Bearing in mind the information they had received and the occurrences they had observed, the officers had ample ground to believe that the petitioner was transporting liquor on which the tax had not been paid.

Clearly, it was not incumbent upon the officers to search the petitioner's car immediately upon leaving the bootleg distributing point. They might have believed that delay might develop additional evidence which would aid in securing a conviction of the petitioner or in disclosing possible confederates.

However, assuming that the officers then did not have probable cause, what transpired subsequently did establish probable cause. The petitioner had driven his car into his garage, the headlights were still burning, and the petitioner had walked to the door of the garage. The fair inference from the testimony is that Investigator Bowes, who had followed on foot, met him there. The officer carried his badge and flashlight and advised the petitioner that he was a Federal officer and had a tip "that this car is hauling bootleg liquor." To this petitioner replied, "Just a little for a party." He was then asked whether the liquor was taxpaid. To this query he responded, "It is Canadian whiskey." These answers were clearly sufficient to justify the

officers in believing that the tax had not been paid on the liquor. The petitioner was further asked whether the liquor was "in there" (referring to the trunk), to which he replied in the affirmative. Not until these admissions were made, did the officers search the automobile, seize its contents, and arrest the petitioner. Clearly the responses which the petitioner made to the officers' questions in and of themselves established probable cause.

While the petitioner stated that the bootleg liquor which he had was intended for a "party", the officers had ample grounds for doubting the statement, in view of the peculiar circumstances under which the liquor was acquired, *i. e.*, that a large quantity was obtained at midnight at a private house. Moreover, under the Liquor Taxing Act the possession and transportation of liquor on which no tax had been paid is *prima facie* a violation of the statute. The fact that such liquor may not have been intended for sale or for use in the manufacture or production of any article intended for sale, is an affirmative defense on which the defendant has the burden of proof. (*Queen* v. *United States*, 77 F. (2d) 780 (App. D. C.), certiorari denied, 295 U. S. 755; *United States* v. *Sarro*, 14 F. Supp. 397 (E. D. N. Y.) See the charge to the jury in the instant case (R. 55), to which the petitioner took no specific exception (R. 57)). Consequently the officers were not required to believe in order to establish probable cause, as the petitioner asserts (Br. 18), that the liquor was intended for sale.

We submit that the facts of the present case are stronger than those found sufficient to establish probable cause in *Carroll* v. *United States*, 267 U. S. 132, and *Husty* v. *United States*, 282 U. S. 694. The case of *United States* v. *Kind*, 87 F. (2d) 315 (C. C. A. 2d), on which petitioner principally relies, is distinguished in the opinion of the District Court (R. 7).

In the *Carroll* case the facts leading to the search and seizure were as follows: Government agents made arrangements with the defendants in Grand Rapids, Michigan, to purchase a quantity of liquor, but the liquor was never delivered. The agents, however, made a note of the defendants' car. About a week later, while the agents were patrolling the highway between Detroit, a well-known smuggling area, and Grand Rapids, the automobile passed them. They followed the car but lost it. Two months later, while they were again patrolling the highway, the defendants passed them in the same car. The agents followed and then stopped and searched the car. The search resulted in finding liquor. There was nothing about the appearance of the car to indicate that liquor was being carried. The agents had no information that the car would be passing at that particular time. Nevertheless this Court upheld the search and seizure.

After quoting (p. 161) the following definition of probable cause from *Stacey* v. *Emery*, 97 U. S. 642, 645:

> If the facts and circumstances before the officer are such as to warrant a man of pru-

> dence and caution in believing that the offense has been committed, it is sufficient,

and the following language of Chief Justice Shaw in *Commonwealth* v. *Carey*, 12 Cush. 246, 251:

> * * * if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful,

this Court concluded (p. 162):

> In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

In recognizing a distinction between a search without a warrant for contraband goods in an automobile which can readily be moved and a search without a warrant for such goods in a permanent structure, this Court said (p. 149):

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is,

> upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

And again (p. 153):

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

In the *Husty* case, *supra*, the defendant Husty had been known to the officers for a number of years as a bootlegger. On the day of his arrest they received confidential information over the telephone from a reliable source that the defendant had two loads of liquor in automobiles, of a particular make and description, parked in particular places on named streets. Acting on the information the officers found one of the cars described, at the point indicated. Later Husty, his codefendant, and a third man entered the car. Husty had started it when he was stopped by the officers. His

codefendant and the third man fled, the latter escaping. The officers searched the car and found it contained a quantity of liquor. In holding that there was probable cause for the search and seizure without a warrant, this Court said (pp. 700–701):

> The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll* v. *United States*, 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra* v. *United States*, 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra* v. *United States, supra; Stacey* v. *Emery*, 97 U. S. 642, 645.

As was said in the *Husty* case, *supra*, it is not necessary, in order to show probable cause, that the arresting officer should have before him legal evidence of the suspected illegal act. Nor, as was also pointed out in that case (p. 700) and in the *Carroll* case (pp. 158–159), was it necessary that the arrest precede the search.

No part of the garage or the petitioner's home was searched. The only thing searched was the automobile which the officers had followed continuously from the place where the contraband was obtained. As they were about to draw near the petitioner's car, it was driven into a garage. The officer followed on foot. The car had barely come to rest. The lights were still burning and the door of the garage was open. Petitioner had just alighted from the car and met the officer at the door. Thus this is not a case of officers entering a closed garage without a warrant to seize contraband stored inside (Cf. *Taylor* v. *United States*, 286 U. S. 1). The car was under constant surveillance from the time it left with its load. The trailing of the car on the street and the search were one continuous and uninterrupted process. There was no intent or purpose on the part of the officers to search the garage or private dwelling and no such search was made. Certainly it cannot be successfully contended that an automobile which the officers have reasonable cause to believe is carrying contraband and which is being trailed can secure immunity by being driven into a private garage.*

* Some authorities hold that a detached private garage, even though used in connection with a dwelling, is not such a part of the dwelling as is protected by the Fourth Amendment. *Earl* v. *United States*, 4 F. (2d) 532 (C. C. A. 9th); *Gay* v. *United States*, 8 F. (2d) 219 (C. C. A. 9th). It does not appear necessary, however, to argue this point.

B. THE SEARCH WAS INCIDENTAL TO A LAWFUL ARREST, AND AS SUCH COULD BE VALIDLY MADE WITHOUT A WARRANT

It is a well-established principle that contemporaneously with and incidentally to a lawful arrest, the arresting officer may make a search of the prisoner's person and of the premises in which the arrest is consummated. In this instance the arrest was unquestionably lawful. Since the offense of which the petitioner was accused was a felony, the arrest could be made on probable cause without a warrant. Whether the officer first informed the petitioner that he was under arrest and then searched the car, or whether he first looked inside the trunk and then placed the petitioner under arrest, is clearly immaterial. The two acts closely followed one another and were part of the same transaction,—part of the same *res gestae*. Their chronological order is irrelevant. In essence, the search was incidental to and contemporaneous with the arrest, and, therefore, lawful.

Assuming *arguendo*, as the petitioner contends, that the garage was a part of the petitioner's private dwelling and, that a search of the petitioner's automobile within the garage may be considered a search of the garage, we submit, nevertheless that the search and seizure were legal.

In *Agnello* v. *United States*, 269 U. S. 20, 30, it was stated by this Court that:

> The right without a search warrant contemporaneously to search persons lawfully

> arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392.

Similar expressions are also found elsewhere in the *Agnello* opinion (pp. 32, 33).

The following cases hold to the same effect: *Marron* v. *United States*, 275 U. S. 192; *Shelton* v. *United States*, 50 F. (2d) 405 (C. C. A. 7th); *Nordelli* v. *United States*, 24 F. (2d) 665 (C. C. A. 9th); *Cline* v. *United States*, 9 F. (2d) 621 (C. C. A. 9th).

In the instant case, as we have heretofore pointed out, the officers had sufficient grounds to believe that a felony was being committed when petitioner left the bootleg distributing point.[10] They therefore had a right to follow the petitioner to and upon his premises and arrest him for such violation and, contemporaneously therewith or incidental thereto, to search the premises where the arrest occurred. As they had reasonable grounds to believe that the petitioner was committing a felony they were not trespassers on the petitioner's premises.

[10] The Liquor Taxing Act makes the offenses charged in the indictment fellonies (see p. 3, *supra*).

Even if it be assumed that probable cause arose solely as a result of information gained by the officer while he was in the petitioner's driveway,[11] that fact did not invalidate the arrest and search. *Hester* v. *United States*, 265 U. S. 57. There is nothing in the testimony indicating that the driveway was not a driveway open from the street, and the photographs, Exhibit A, introduced in evidence at the hearing on the motion to suppress (R. 19, 24), and which has been filed in this Court pursuant to stipulation of counsel, clearly shows that it was. Under these circumstances, the officers did not invade the privacy of the petitioner's home, even if it be assumed that the garage may be considered a part of his "house" within the meaning of the Fourth Amendment. That Amendment obviously was intended to prevent the invasion, without lawful right, of the privacy of a person's home. Even if the officer committed a trespass it clearly was not one which infringed on such privacy. *Hester* v. *United States, supra.* In that case the officers concealed themselves about fifty to one hundred yards from Hester's house and observed violations of the National Prohibition Act on the defendant's land, on which they later seized a vessel containing liquor. This Court held that the officer's testimony was not

[11] There is nothing in the testimony of Investigator Bowes, who was the petitioner's witness at the hearing upon the motion to suppress evidence, to show that he had entered the garage prior to the entry made in order to search the car (R. 25).

obtained by an illegal search or seizure, even if there had been a trespass. Mr. Justice Holmes said (p. 59):

> The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

While it was held by this Court in *Taylor* v. *United States, supra,* that an officer may not enter a garage adjacent to a private dwelling merely for the purpose of securing incriminating evidence, we do not find such a situation here. In the *Taylor* case, as this Court pointed out, there was no one in the garage at the time of the officers' entry and consequently their action could not have been for the purpose of making an arrest and an incidental or contemporaneous search. In the instant case the facts were exactly to the contrary. The evidence on the motion to suppress clearly does not support the proposition that the predominant purpose of the officer in entering the garage was to search rather than to arrest. It will be noted that in the *Agnello* case (pp. 30, 32, 33) this Court indicates that there is no distinction between a lawful search being "incident" to or "contemporaneous" with the arrest.

The predominant thought is evidently that the arrest must be the primary objective and the search the subsidiary purpose of the entry on premises in order to justify the search. Which precedes the other is immaterial, so long as the two are part of the same transaction.[12]

Petitioner suggests that the officers might have obtained a warrant to search his automobile, if they believed that they had reasonable and probable cause to do so, after the automobile had been driven into the petitioner's garage. He argues that it would have been a simple matter to have had one of the officers obtain the search warrant while the other officer watched the premises (Br. 21). This contention ignores the fact that the time was shortly after midnight, and that one or more officers would have had to maintain a vigil until a warrant could be secured in the morning. Moreover, even if one of the officers had remained on guard there was no assurance that the car would not have been driven away. There was in the instant case the same impracticability with respect to securing a search warrant as there was in the *Carroll* and *Husty* cases, *supra*.

In considering the validity of the search and seizure the burden was on the petitioner to establish that the evidence was inadmissible and that his motion to suppress should be granted. *Schnitzer* v. *United States*, 77 F. (2d) 233, 235 (C. C. A. 8th); *Distefano* v. *United States*, 58 F. (2d) 963, 964

[12] For example, in *Donahue* v. *United States*, 56 F. (2d), 94 (C. C. A. 9th), the serch preceded the arrest.

(C. C. A. 5th); *United States* v. *Fitzmaurice,* 45 F. (2d) 133, 135 (C. C. A. 2d); *Samson* v. *United States,* 26 F. (2d) 769, 770 (C. C. A. 1st); *United States* v. *Wainer,* 49 F. (2d) 789, 794 (W. D. Pa.); *United States* v. *Vatune,* 292 Fed. 497, 499 (N. D. Cal.).

We submit that under all the facts and circumstances the search and seizure in the instant case were legal and that the motion to suppress was properly overruled.

## II

IT WAS NOT ERROR TO SUSTAIN OBJECTIONS TO QUESTIONS SEEKING TO ELICIT FROM GOVERNMENT WITNESSES THE IDENTITY OF THEIR CONFIDENTIAL INFORMER.

At the trial petitioner, on cross-examination of Investigator Williamson, a witness for the Government, inquired whether the latter had received any information which he considered reliable concerning the petitioner's "actions" in Charleston, West Virginia, and whether the witness had at any time received any information concerning the petitioner which he considered reliable information and which later turned out to be unreliable, false and perjurious. This cross-examination was not permitted (R. 29).

He requested Investigator Bowes, another Government witness at the trial, to "tell us the name of your confidential informer." (R. 34.) An ob-

jection by the Government to this question was sustained. The validity of this ruling is now challenged. However, no formal exception was taken at the trial. Nevertheless, without waiving this defect, we shall discuss the subject as though it were properly presented.

In a colloquy with the trial court the petitioner's counsel stated that he proposed to show "by this line of cross-examination that the witness received information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable"[13] (R. 34–35).

Petitioner now contends that "since the search without a warrant in the case at bar was based on information obtained from a 'confidential informer,' that the defendant and the Court were entitled to know the name of that informer and all

[13] The petitioner states in his brief that as the result of this investigation of the Attorney General, the Government confessed error in the Circuit Court of Appeals, upon which confession of error the case was reversed and remanded and the present trial had (Br. 28). It should be pointed out in this connection that there is nothing in the record in the instant case or in the files of this Department which indicates that the information which resulted in the erroneous testimony at the former trial came from the same source as the information which the petitioner now attempts to impugn.

the circumstances, so that the Court could determine whether or not the information was given by a reliable informant." (Br. 31.) Again he states: "It is * * * our contention that the defendant was entitled to know the source of the agent's information so that the court might determine whether or not a case of probable cause had been established" (Br. 30). He urges, in effect, that if the cross-examination had been permitted, the resulting testimony might have cast doubt upon the judgment of the officers in determining the reliability of the confidential information.

The general rule is that for reasons of public policy the sources of confidential information given to Government officers may be kept secret and need not be disclosed. This rule is founded on the right and duty of every citizen to communicate to the executive officers of the Government charged with the duty of enforcing the law any information he may have with respect to violations of the law. The information is therefore regarded as a privileged communication which the courts will not compel or permit to be disclosed without the consent of the Government. *Elrod* v. *Moss*, 278 Fed. 123, 127 (C. C. A. 4th); *Arnstein* v. *United States*, 296 Fed. 946, 950 (App. D. C.), certiorari denied, 264 U. S. 595; *Mitrovich* v. *United States*, 15 F. (2d) 163 (C. C. A. 9th); *Segurola* v. *United States*, 16 F. (2d) 563, 565 (C. C. A. 1st), affirmed on other grounds, 275

U. S. 106; *Goetz* v. *United States,* 39 F. (2d) 903 (C. C. A. 5th); *Shore* v. *United States,* 49 F. (2d) 519, 522 App. D. C.),[14] certiorari denied, 283 U. S. 865; 285 U. S. 552; *McInes* v. *United States,* 62 F. (2d) 180, 181 (C. C. A. 9th), certiorari denied, 288 U. S. 616; *Worthington* v. *Scribner,* 109 Mass. 487, 488–489; *Trial of Thomas Hardy,* 24 State Trials 199, 808; *Marks* v. *Beyfus,* L. R. 25 Q. B. D, 494, 498; Wigmore on Evidence, 2d ed., Vol. 5, Sec. 2374; Underhill's Crim. Ev., 4th ed., Sec. 332. See also *Vogel* v. *Gruaz,* 110 U. S. 311, 315–316 and *In re Quarles and Butler,* 158 U. S. 532, 535–536.

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[14] In *Shore* v. *United States,* cited in the text, Judge Groner stated (pp. 522–523):

> Obviously, the whisky having been legally seized, as we hold, it was proper to retain it as evidence, and the suggestion that an officer receiving confidential information of an alleged violation of the law should be required to disclose the name of his informant has been decided to the contrary. *Vogel* v. *Gruaz,* 110 U. S. 311, 4 S. Ct. 12, 28 L. Ed. 158; *Segurola* v. *U. S.* (C. C. A.), 16 F. (2d) 563, and the cases cited there. But, without regard to this principle, defendants may no more complain of the action of the court in refusing to require this fact to be disclosed than could defendants in the *Segurola* Case, supra, for the information thus obtained by the police furnished only the impulse for the act—the watch and search. The information itself was not used as evidence of guilt, and the fact of guilt itself is really not denied, and, if the uncontradicted evidence of the officers is believed, the defendant Shore intends to persist in his unlawful career. To have required, under these circumstances, that the name of the informant should be disclosed, would merely have gratified his curiosity or his vengeance, whichever was most involved, without affecting in any way the pending question before the court.

In the case of *In re Quarles and Butler, supra,* this Court said (pp. 535–536):

> It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and *the disclosure of which cannot be compelled without the assent of the government.* [Italics ours.]

In the *Quarles* case and in *Vogel* v. *Gruaz, supra,* this Court cited *Worthington* v. *Scribner, supra,* in which it was said (pp. 488–489):

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to

> be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. *Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government.* The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. [Italics ours.]

Some cases have recognized an exception to or qualification of this rule and have permitted the disclosure of the identity of the informer or the source of confidential information when such disclosure is necessary either to establish the innocence of a defendant or otherwise to permit the proper disposition of the issues of a particular case. *Trial of Thomas Hardy, supra,* p. 808; *Marks* v. *Beyfus, supra,* p. 498; *Regina* v. *Richardson,* 3 Foster & Fin. N. P. Cases 693; *Humphrey* v. *Archibald,* 20 Ont. App. 267, 270; *United States* v. *Blich,* 45 F. (2d) 627 (Wyo.); *Wilson* v. *United*

*States*, 59 F. (2d) 390, 392 (C. C. A. 3d); *Centoamore* v. *State*, 105 Neb. 452, 455–456; *United States* v. *Moses*, 4 Wash. C. C. (U. S.) 726, 727; Wigmore on Ev., *supra*, p. 176; Underhill's Crim. Ev., *supra*, p. 634.

In *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494, Lord Esher enunciated the general principle (p. 498):

> "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person . . . and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." Now, this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should

> be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not. The learned judge was, therefore, perfectly right in the present case in applying the law, and in declining to let the witness answer the questions. The result of his so deciding was, of course, that the plaintiff's cause of action, which was founded on the alleged instigation of the Director of Public Prosecutions by the defendants, failed, for there was no evidence of any such instigation.

Preliminarily, it may be pointed out that, as is apparent from our prior discussion, there is no basis for any inference that the Government is compelled to rely, as the petitioner seems to think, upon the confidential information to sustain the validity of the search and seizure, in view of the petitioner's admissions when questioned by the officer at his garage (see pp. 18–19, *supra*). There is consequently no occasion for the application of the exception, sometimes recognized, to the general rule against disclosing the source of confidential information.

Even if it is assumed, *arguendo*, as the petitioner asserts (Br. 30), that the determination of the source of the officers' prior information had any relevance to the issue of probable cause, it is nevertheless submitted that the court did not err in sustaining the objection to petitioner's question.

In the instant case the petitioner does not contend that the identity of the informer had any bearing on any other issue except that of probable cause for the search and seizure. That issue had, however, been concluded prior to the trial. In *Segurola* v. *United States,* 275 U. S. 106, 111, this Court said that—

> except where there has been no opportunity to present the matter in advance of trial, *Gouled* v. *United States,* 255 U. S. 298, 305; *Amos* v. *United States,* 255 U. S. 313, 316; *Agnello* v. *United States,* 269 U. S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. * * *

At the trial the petitioner did not attempt to renew his motion to suppress, and he failed to interpose any objection to the admission of the testimony of the officers as to what they discovered on their search of the automobile on the ground that the

search was illegal, as he might have done[15] (R. 28, 33). It is evident, therefore, that the trial was properly confined to the issue of the guilt or innocence of the petitioner of the offenses charged in the indictment. Petitioner freely admitted that he purchased, transported, and possessed liquor (R. 48), which the evidence clearly showed was non-tax paid (R. 49–50, 52), and attempted to show that he did not know that the liquor was tax-unpaid and that it was not intended for sale but for private purposes (R. 37–40, 41–47, 48–49, 55), with a view apparently to bringing his case within the exception contained in the Liquor Taxing statute, and the case went to the jury on these defenses (R. 52, 55). It must be apparent that the identity of the informer could have had no possible bearing on these issues. In fact, the petitioner does not contend that it did. Since it is clear that the disclosure of the identity of the informer was not necessary to the disposition of any of the issues involved at the trial, there was no occasion for applying the exception, sometimes recognized, to the

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[15] In *Cogen* v. *United States*, 278 U. S. 221, 224, this Court said:

> It is not true that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence. If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained. * * *

general rule above discussed. Cf. *Segurola* v. *United States, supra; Shore* v. *United States,* 49 F. (2d) 519, 523 (App. D. C.).

As there was no attempt to elicit a disclosure of the identity of the confidential informer at the hearing on the motion to suppress, it seems unnecessary to discuss the situation which might have arisen if such an endeavor had been made.

The petitioner suggests, in passing, that the trial court erred in permitting the Government witness Williamson to testify "that he had received reliable information from the confidential informer" (Br. 30–31, see R. 29, *supra*). We can best answer the suggestion in the language of Judge Groner in *Shore* v. *United States,* 49 F. (2d) 519, 523, *supra,* in disposing of a similar contention: "The information thus obtained by the police furnished only the impulse for the act—the watch and search. The information itself was not used as evidence of guilt." Moreover, this question was not raised by the assignment of errors contained in the petition for writ of certiorari (pp. 7–9).

Petitioner further complains of the failure of the trial court to grant his motion for a new trial (R. 12–13). The disposition of the motion for a new trial was a matter within the sound discretion of the court. The order on such motion is not appealable. *Holmgren* v. *United States,* 217 U. S. 509, 521; *Ayers* v. *Watson,* 137 U. S. 584, 597; *Kerr* v. *Clampitt,* 95 U. S. 188, 189.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

ROBERT H. JACKSON,
*Solicitor General.*
BRIEN MCMAHON,
*Assistant Attorney General.*
ALEXANDER HOLTZOFF,
*Special Assistant to the Attorney General.*
MAHLON D. KIEFER,
HERBERT A. BERGSON,
*Attorneys.*

OCTOBER, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

# SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1938.

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|---|---|
| Hyman Scher, Alias William Scher, Petitioner, *vs.* The United States. | Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. |

[December 5, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner Scher was found guilty under two counts of an indictment which charged violations of section 201 Title II Liquor Taxing Act, January 11, 1934[1] by possessing and transporting distilled spirits in containers wanting requisite revenue stamps. He was sentenced for a year and a day, etc. The Circuit Court of Appeals affirmed the judgment.

No objection to the judge's charge is urged and the evidence submitted to the jury is adequate to support the verdict.

The material facts are not in serious dispute. A brief summation will suffice for the points to be considered.

Federal officers received confidential information thought to be reliable that about midnight, December 30, 1935, a Dodge automobile with specified license plate would transport "phony" whiskey from a specified dwelling in Cleveland, Ohio. About nine-thirty officers posted nearby saw the described automobile stop in front of the house and remain there for an hour. A man with three women and a package then entered the car and drove away

[1] Ch. 1, sec. 201, 48 Stat. 313, 316 (U. S. C., Title 26, Sec. 1152a, 1152g)—

"No person shall . . . transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

"(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; . . . ."

Sec. 207—"Any person who violates any provision of this title . . . shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both."

It returned shortly before midnight, stopped at the rear of the house and remained for half an hour. The headlights were extinguished; the officers heard what seemed to be heavy paper packages passing over wood. Doors slammed; petitioner drove the car away, apparently heavily loaded. The officers followed in another car. After going a few blocks petitioner stopped briefly at a filling station; then he drove towards his own residence two or three blocks further along. The officers followed. He turned into a garage a few feet back of his residence and within the curtilage. One of the pursuing officers left their car and followed. As petitioner was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor. Petitioner replied, "just a little for a party." Asked whether the liquor was tax paid, he replied that it was Canadian whiskey; also, he said it was in the trunk at the rear of the car. The officer opened the trunk and found eighty-eight bottles of distilled spirits in unstamped containers. He arrested petitioner and seized both car and liquor. The officer had no search warrant.

At the trial counsel undertook to question the arresting officers relative to the source of the information which led them to observe petitioner's actions. Objections to these questions were sustained and this is now assigned as error.

Before trial petitioner's counsel moved "to suppress all of the evidence obtained by the search made by the Revenue agents in the above entitled cause, together with all information obtained by reason of such search, and to grant an order requiring the agents to return all articles seized by reason of said search . . . ." In support of this he relied upon the facts above stated. Denial of this motion is said to be error.

The exception in respect of transporting liquor not intended for sale found in the statute affords matter for affirmative defense. *Queen* v. *United States*, 77 F. (2d) 780.

In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information as in *United States* v. *Blich*, 45 F. (2d) 627.

Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. *Segurola* v. *United States*, 16 F. (2d) 563, 565; *Shore* v. *United States*, 49 F. (2d) 519, 522; *McInes* v. *United States*, 62 F. (2d) 180.

Considering the doctrine of *Carroll, et al.* v. *United States*, 267 U. S. 132 (See *Husty* v. *United States*, 282 U. S. 694), and the application of this to the facts there disclosed, it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.

Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt. The officers did nothing either unreasonable or oppressive. *Agnello* v. *United States*, 269 U. S. 20, 30; *Wisniewski* v. *United States*, 47 F. (2d) 825, 826.

The challenged judgment is

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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